

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In re:

5

6 LEHMAN BROTHERS HOLDINGS INC.,

7 et al., Case No. 08-13555(SCC)

8 Debtors.

9 - - - - - x

10 In re:

11

12 LEHMAN BROTHERS INC., Case No. 08-01420(SCC)

13 (SIPA)

14 Debtor.

15 - - - - - x

16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19

20 February 19, 2015

21 10:02 AM

22

23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Adversary Proceeding: 08-01420-scc Lehman Brothers, Inc.
2 Doc. #11147 Motion to Authorize/Trustee's Motion for an
3 Order to (I) Establish a Second Interim Distribution Fund
4 for Unsecured General Creditor Claims, (II) Release Reserves
5 from the Secured and Priority Reserve and the First Interim
6 Distribution Fund, and (III) Make a Second Interim
7 Distribution to Holders of Allowed Unsecured General
8 Creditor Claims with a Record Date of February 6, 2015
9
10 Doc. #11046 Motion to Authorize/Trustee's Motion for an
11 Order Authorizing the Abandonment of Certain Lehman Brothers
12 Inc. Data
13
14 Doc. #6758 One Hundred Second Omnibus Objection to General
15 Creditor Claims (Satisfied Claims)
16
17 Doc. #9605 Two Hundred Sixtieth Omnibus Objection to General
18 Creditor Claims (No Liability Claims)
19
20 08-13555-scc Lehman Brothers Holdings Inc.
21 Doc. #47931 Motion to Approve Compromise: Motion Pursuant to
22 Rule 9019 of the Federal Rules of Bankruptcy Procedure and
23 Section 105(a) of the Bankruptcy Code for Approval of
24 Settlement Agreement Relating to Exum Ridge CBO 2007-2
25 Credit Default Swap Agreement and Indenture

1 Doc. #47078 Four Hundred Eighty-Sixth Omnibus Objection to
2 Claims (Satisfied Claims)

3

4 Doc. #47589 Motion to Allow/Deem Proofs of Claim to Be
5 Timely Filed by the Claims Bar Date

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed by: Sherri L. Breach

1 A P P E A R A N C E S :

2 WEIL, GOTSHAL & MANGES LLP

3 Attorney for LBHI

4 787 Fifth Avenue

5 New York, New York 10153

6

7 BY: GARRETT A. FAIL, ESQ.

8 JACQUELINE MARCUS, ESQ.

9 MAURICE HORWITZ, ESQ.

10 CANDACE ARTHUR, ESQ.

11

12 CHAPMAN AND CUTLER, LLP

13 Attorney for U.S. Bank National Association, as

14 Trustee

15 111 West Monroe Street

16 Chicago, Illinois 60603-4080

17

18 BY: FRANKLIN H. TOP III, ESQ.

19

20 WINSTON & STRAWN, LLP

21 Attorneys for Nomura

22 200 Park Avenue

23 New York, New York 10166

24

25 BY: DAVID NEIER, ESQ.

1 HUGHES, HUBBARD & REED, LLP

2 Attorneys for James Giddens, SIPA Trustee

3 One Battery Park Plaza

4 New York, New York 10004-1482

5

6 BY: MEAGHAN C. GRAGG, ESQ.

7 JEFFREY S. MARGOLIN, ESQ.

8 DINA R. HOFFER, ESQ.

9 JORDAN E. PACE, ESQ.

10

11 HOGAN LOVELLS US, LLP

12 Attorneys for Dr. Thomas Marsoner

13 875 Third Avenue

14 New York, New York 10022

15

16 BY: M. SHANE JOHNSON, ESQ.

17 CHRISTOPHER R. DONOHO, III, ESQ.

18

19 MAX MARCUS KATZ, PC

20 Attorney for Eli Eddie

21 88 University Place

22 New York, New York 10003

23

24 BY: MAX MARCUS KATZ, ESQ.

25

1 MOSES & SINGER

2 Attorneys for claimants

3 The Chrysler Building

4 405 Lexington Avenue

5 New York, New York 10174

6

7 BY: MARK N. PARRY

8

9 THOMPSON COBURN, LLP

10 Attorneys for Claimants

11 One US Bank Plaza

12 St. Louis, Missouri 63101

13

14 BY: DAVID D. FARRELL, ESQ.

15 WARREN L. DEAN, JR., ESQ.

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 **(DISCLAIMER: Channel 4 of the audio is not working;
3 thus when objections are made, and can't be heard, they are
4 noted as "indiscernible")

5 THE COURT: How is everyone today?

6 All right. We're ready when you are.

7 (Pause)

8 THE COURT: Okay. Good morning.

9 MS. GRAGG: Good morning, Your Honor. Meaghan
10 Gragg of Hughes, Hubbard & Reed, Counsel for James W.
11 Giddens, the SIPA trustee. We have four items on the LBI --

12 THE COURT: Yes.

13 MS. GRAGG: -- agenda. I -- you are --

14 THE COURT: Yes.

15 MS. GRAGG: -- aware of it? Okay.

16 THE COURT: Uh-huh.

17 MS. GRAGG: I'm addressing the first item on the
18 agenda which is the second interim distribution motion.

19 THE COURT: Yes.

20 MS. GRAGG: In that motion we're asking this Court
21 to authorize the trustee to establish a second interim
22 distribution fund of \$2.45 billion for purposes of making a
23 second interim distribution to allow to unsecured general
24 creditors and release reserves from the secured priority
25 claim reserve and first interim distribution fund,

1 preserving for remaining unresolved claims, and to authorize
2 the trustee to make a second interim distribution from the
3 LBI general estate to allow to unsecured general creditors
4 with a record date of February 6th, 2015 which would achieve
5 a cumulative 27 percent interim distribution to LBI's
6 unsecured general creditors.

7 Your Honor, it is with great satisfaction that we
8 appeared before the Court this past summer seeking authority
9 first to establish a reserve for and satisfy allowed secured
10 and priority claims and, second, to establish a first
11 interim distribution fund of 4.6 billion and make a 17
12 percent first interest -- interim distribution to allow to
13 unsecured creditors.

14 Since then, the trustee has distributed more than
15 3.8 billion to LBI's creditors which includes 100 million
16 distributed in January alone.

17 Now we're pleased to appear before the Court once
18 again to report that as a result of substantial progress
19 over the past six months in reconciling the Court's
20 assistance and advice and support of SiPC, disputed customer
21 and general creditor claims. Over the past six months we've
22 resolved more than 900 general creditor claims to allow the
23 release of over half a billion dollars that had previously
24 been set aside as reserved and, in addition, resolve
25 disputed customer claims and recover customer property

1 allowed to the allegation of another 1.2 billion from the
2 customer estate to the general estate.

3 As a result, the trustee is in the position with a
4 sufficient pool of available cash to significantly increase
5 the distribution to general creditors. Unsecured general
6 creditors now stand to receive more than a quarter of their
7 allowed claims with future distributions likely.

8 If approved, this second interim distribution
9 would achieve a cumulative 27 percent interim distribution
10 to LBI's unsecured creditors, a remarkable point in this
11 proceeding particularly given that when this liquidation
12 began it was far from certain that general creditors would
13 receive anything.

14 The relief the trustee now seeks, which is
15 detailed in the motion, is consistent with the relief
16 already granted by the Court and secured in priority reserve
17 order in the first interim distribution order. All
18 outstanding general creditor claimants were served with the
19 motion and schedules and had the opportunity to be heard.

20 We've discussed the motion with certain claimants
21 concerned about how the relief requested in the motion might
22 affect their claims and reserves established by the
23 trustee's previous distribution motions. The trustee
24 resolved the claimants' concerns through explanation and
25 some minor adjustments to the proposed order.

1 The trustee only received one response to the
2 motion filed by Mr. Steven --

3 THE COURT: Yes.

4 MS. GRAGG: -- Geiters (ph). It reiterates his
5 opposition that was overruled by the Court --

6 THE COURT: Yes.

7 MS. GRAGG: -- previously.

8 Entering this order will benefit creditors
9 supported by SiPC and supported by major creditors of the
10 estate. If you have -- Your Honor has any questions I'm
11 here to answer them, otherwise we respectfully request that
12 the Court enter the proposed order.

13 THE COURT: Okay. Very well. Does anyone wish to
14 be heard with respect to the trustee's motion regarding a
15 second interim distribution and related relief?

16 All right. Well, I quite agree that this is a
17 noteworthy achievement, one that was not at all anticipated
18 when these cases were commenced. Indeed, it was unlikely
19 that it was anticipated three or four years ago, and I
20 believe it stands as a testament to the continuing efforts
21 of all the professionals involved in the winding down of
22 these estates, both on behalf of the estates and SiPC and
23 the creditors as well because the creditors have waited this
24 long a period of time and have, in many instances, worked
25 with the trustee toward a consensual resolution of

1 outstanding matters for which we are particularly grateful.

2 So, yes, we will enter the order approving the
3 trustee's motion today.

4 Thank you.

5 MS. GRAGG: Thank you, Your Honor. I'll turn this
6 over to Jeff Margolin to address the second item --

7 THE COURT: Very good.

8 MS. GRAGG: -- on the agenda.

9 THE COURT: Thank you.

10 (Pause)

11 THE COURT: Good morning.

12 MR. MARGOLIN: Good morning, Your Honor. For the
13 record Jeffrey Margolin, Hughes, Hubbard & reed for Mr.
14 Giddens.

15 Your Honor, the next matter on the agenda is the
16 trustee's uncontested motion for authority to abandon and
17 destroy 236 terabytes of data maintained by the LBI estate.
18 This data constitutes copies, Your Honor. It's fully
19 duplicative of data that will be continued to be maintained
20 by the estate.

21 With many phases of the liquidation substantially
22 complete, Your Honor, this motion is the first step in a
23 process initiated by the trustee's professionals to
24 determine whether documents and data are necessary to
25 effectuate the remaining work streams of the estate or

1 whether such documents and data may be ripe for abandonment
2 and destruction in furtherance of the trustee's goals of
3 further reducing administrative expenditures and conducting
4 an orderly wind-down and closure of the estate.

5 I anticipate, Your Honor, that we'll be back here
6 on additional motions for abandonment of documents and data
7 as work streams further cease.

8 THE COURT: In this case, though, as you
9 represented, these are -- these files are duplicative of
10 files or data that are stored elsewhere?

11 MR. MARGOLIN: That's correct. They're maintained
12 by the trustee's professionals. In fact, Your Honor, this
13 data is in certain respects outdated and obsolete. It --
14 there's also a modest cost savings involved with abandoning
15 and destroying this data.

16 THE COURT: All right.

17 MR. MARGOLIN: Your Honor, no responses were
18 received to the motion. SiPC and the ad hoc group of LBI
19 creditors are -- were among the largest of the estate to
20 support the relief requested.

21 Unless the Court has any questions, the trustee
22 respectfully requests entry of an order as yet another step
23 toward winding down the estates.

24 THE COURT: All right. Very well. Let me ask if
25 anybody wishes to be heard with respect to the trustee's

1 motion to authorize the abandonment of certain electronic
2 data?

3 All right. No response. The motion will be
4 granted.

5 MR. MARGOLIN: Thank you, Your Honor. We'll
6 submit an order at the end --

7 THE COURT: Thank you very much.

8 MR. MARGOLIN: -- of the hearing.

9 THE COURT: All right. So the next matter, I
10 think we're now turning to the contested matters. And the
11 first one I have is with respect to the claim of Mr. Eddie
12 (ph).

13 MS. HOFFER: Good morning, Your Honor. Dina
14 Hoffer of Hughes, Hubbard & Reed for the SIPA trustee.
15 Today I'll be addressing the response to the trustee's one
16 hundred and second omnibus objection to satisfy general
17 creditor claims.

18 The trustee initially objected to 22 claims that
19 had been satisfied through the customer accounts transfer
20 process. The trustee did not receive responses as to the
21 other 21 of those claims. They have been disallowed and
22 expunged by order of the Court.

23 Claimant does not dispute that the assets in his
24 account as of the filing date were transferred to Barclays
25 Capital, Inc. and that he received those assets. Instead,

1 he claims \$248,900 in market losses incurred between July
2 2007 and September 2008 in connection with shares of
3 Carlisle Capital Corporation.

4 On his claim form claimant characterized the basis
5 of his claim as unsuitable investment on the part of LBI
6 prior to the SIPA proceeding. And in his opposition he
7 vaguely alleges that LBI was negligent and/or breached its
8 fiduciary duties in its management of his account.

9 Claimant has been represented by the same counsel
10 since filing his initial claim form, yet he has provided no
11 evidentiary support or legal theory in either his original
12 claim materials or his opposition brief to establish any of
13 these basis for LBI liability in connection with the market
14 losses he incurred during the height of the financial
15 crisis.

16 Thus, claimant has failed to meet the pleading
17 requirements of Rule 8(a)(2) of the Federal Rules of Civil
18 Procedure by offering only labels and conclusions without
19 providing factual content that could allow the Court to draw
20 the reasonable inference that LBI is liable for the alleged
21 misconduct.

22 Claimant has also failed to meet the heightened
23 pleading requirements of Rule 9(b) which require plaintiff
24 to allege the content of the misrepresentations on which he
25 has relied as well as the fraudulent scheme and intent of

1 the defendants.

2 In the context of unsuitable trading, subsequent
3 diminution in value and conclusary allegations regarding
4 inappropriate investments are not sufficient to meet the
5 pleading requirements. Claimant vaguely alleges claims of
6 unsuitable investment, negligence and/or breach of fiduciary
7 duty prior to the filing date in connection with the alleged
8 mismanagement of his account.

9 However, the alleged mismanagement is described
10 only as recommending purchasing the shares of Carlisle and
11 advising retaining the shares of Carlisle. Neither of the
12 statements in the claim nor the response are sufficiently
13 particularized for alleging negligence, breach of fiduciary
14 duty or fraudulent conduct based on unsuitable investing.
15 The claimant has offered no evidentiary proof to support his
16 claims despite several opportunities to do so.

17 On that basis, unless the Court has questions, we
18 request that for the reasons set forth in the trustee's
19 reply claimant's response be overruled and the one hundred
20 second omnibus objection be granted with respect to this
21 claim.

22 THE COURT: Thank you very much.

23 Someone wish to be speak on behalf of Mr. Eddie?

24 MR. KATZ: Yes, Your Honor.

25 Good morning, Your Honor.

1 THE COURT: Good morning.

2 MR. KATZ: My name is Max Marcus Katz. I
3 represent the claimant, Eli Eddie.

4 The issues of unsuitability, Your Honor, as they
5 lay themselves out are a matter of fact --

6 THE COURT: They haven't been laid out.

7 MR. KATZ: Well --

8 THE COURT: That's the problem. There's been a
9 very conclusory allegation that the investment in the
10 Carlisle securities constituted unsuitable trading. Nothing
11 has been laid out other than the conclusion that that was an
12 unsuitable trade and that somehow that breached some
13 unspecified fiduciary duty.

14 So we -- we've now been -- we're now several years
15 into this and, indeed, this very hearing has been adjourned
16 from time to time. And as counsel indicated, nothing -- no
17 further detail has been provided.

18 So, frankly, the only question, the only question
19 that I think bears some discussion is whether or not the
20 objection is going to be granted and the claim dismissed
21 with prejudice or whether or not there's going to be any
22 opportunity to re-plead.

23 MR. KATZ: Your Honor, let me explain who I
24 represent. I represent a fifty-year-old man --

25 THE COURT: Okay.

1 MR. KATZ: -- who invested a sum of \$250,000 with
2 Lehman Brothers, put it into the account as cash. A month
3 later a -- Lehman Brothers proceeded to purchase, in his
4 behalf, through an IPO a number of shares --

5 (Pause)

6 MR. KATZ: The number of shares was 13,000 in
7 Carlisle Capital Corp. The 13,000 shares represented 99
8 percent of the capital that Mr. Eddie had invested with
9 Lehman. This in spite of the fact that Lehman, in each of
10 its monthly statements, sends out a caveat stating, "Lehman
11 Brothers would like to remind you about the importance of
12 diversifying your portfolio."

13 THE COURT: Okay. So let's focus on that point.

14 MR. KATZ: Okay.

15 THE COURT: Mr. Eddie got monthly statements from
16 Lehman -- from LBI, from the broker?

17 MR. KATZ: Well, he joined --

18 THE COURT: He --

19 MR. KATZ: -- in June --

20 THE COURT: Why don't we say yes or no? After the
21 --

22 MR. KATZ: Yes.

23 THE COURT: After the securities were purchased
24 did Mr. Eddie get monthly statements?

25 MR. KATZ: After.

1 THE COURT: Okay.

2 MR. KATZ: Not before.

3 THE COURT: And that occurred in 2007 --

4 MR. KATZ: Yes.

5 THE COURT: -- right, before the market took its

6 --

7 MR. KATZ: Yes.

8 THE COURT: -- historic plunge, right?

9 MR. KATZ: Yes.

10 THE COURT: Did Mr. Eddie call his broker at
11 Lehman and say --

12 MR. KATZ: Yes.

13 THE COURT: Where is that alleged?

14 MR. KATZ: Not about that. Not about this
15 statement. Not about the fact that his portfolio should
16 have been diversified, but he did call to sell the stock.

17 THE COURT: When did he do that?

18 MR. KATZ: In August of that year.

19 THE COURT: Has any of this been alleged in
20 response to the trustee's many, many requests for
21 information? Has any of this been provided?

22 MR. KATZ: The answer is no.

23 THE COURT: Well, that's a massive waste of
24 everyone's time.

25 MR. KATZ: Your Honor, as far as -- Your Honor,

1 we've never had --

2 THE COURT: If you would like to --

3 MR. KATZ: -- any demand for this.

4 THE COURT: I'm sorry.

5 MR. KATZ: We've never had any demand for
6 information to the trust -- that the trustee would need.

7 THE COURT: The counsel for the trustee just stood
8 at the podium and indicated, consistent with what happens on
9 every claim in this case, procedures that are designed to
10 elicit any further information to inform the trustee's
11 decision as to whether or not to allow the claim. The
12 trustee has indicated that that has not been forthcoming.

13 MR. KATZ: It hasn't been forthcoming because it
14 hasn't been requested. And not only that, but there are a
15 few simple facts here, Judge, that put this thing into
16 perspective.

17 THE COURT: Go right ahead.

18 MR. KATZ: One, I represent an individual who
19 doesn't have a high school diploma.

20 Two, and this is all information that Lehman
21 Brothers had through its --

22 THE COURT: Okay. I would like you to tell me why
23 that should have any bearing on the legal decision as to
24 whether or not your client has -- should have an allowed
25 claim against LBI.

1 MR. KATZ: No. No. But --

2 THE COURT: There are -- have been many, many
3 claimants who come before me and who also came before Judge
4 Peck before me whose personal situations were very dire and
5 unfortunate in light of the cataclysmic fail of Lehman
6 Brothers. But there's nothing in the law that allows me to
7 make decisions on claims based on the personal circumstances
8 of any individual.

9 MR. KATZ: Well, there are -- I can appreciate
10 that fact. But there are outside facts and outside laws
11 that regulate the relationship between the broker and the
12 customer --

13 THE COURT: Okay.

14 MR. KATZ: -- such as Article III, Rule 2 of the
15 NASDAQ rules which requires that a broker and a security
16 dealer make inquiry into the makeup of a -- of an investor,
17 of a customer.

18 THE COURT: Okay. Are you alleging or suggesting
19 that the purchase of the Carlisle securities was outside the
20 parameters that had been established between your client and
21 LBI?

22 MR. KATZ: Yes.

23 THE COURT: You are?

24 MR. KATZ: Yes. Yes, because --

25 THE COURT: But you don't allege that. You --

1 this was a -- as far as anyone can tell or surmise this was
2 a discretionary account. The investment was made, and you
3 don't allege that particular parameters were given to LBI
4 and that the trade was made in contravention of those
5 parameters.

6 MR. KATZ: Judge, we allege unsuitability. When
7 the broker goes ahead and puts 100 percent of a client's
8 money, even though the broker is recommending that it be
9 diversified, speaks for itself that it's not suitable. He's
10 violated his own rules. The broker has violated his own
11 rules, and it's violated the rules of the NASDAQ which means
12 -- which requires inquiry into who you're investing -- who
13 you're acquiring the securities for. There was no inquiry
14 here. A hundred percent of the securities were purchased
15 without the customer knowing what he was purchasing. How
16 can that be -- how can that not be unsuitable when the
17 customer doesn't know?

18 Oh, by the way, customer didn't get a prospectus
19 until after the purchase. That's if he would be able to
20 read it to begin with to understand what it states.

21 THE COURT: Okay. Well, don't suggest to me that
22 it's problematic that he didn't get a prospectus until
23 afterwards and then in the very next sentence tell me that
24 had he gotten it he wouldn't have read it or been able to
25 understand it either way. Those are inconsistent

1 allegations.

2 And the fact -- the unfortunate fact is that had
3 the -- had the numbers gone up we wouldn't be here. It's
4 only because --

5 MR. KATZ: Well, of course.

6 THE COURT: -- of what -- right. But it's only
7 because there was a cataclysmic worst recession since the
8 Great Depression ever that we have this --

9 MR. KATZ: Well --

10 THE COURT: -- issue. So many, many others with
11 multiple advanced degrees lost a lot of value in 2008 and
12 2009.

13 MR. KATZ: But, certainly, if there had been some
14 caution and care maybe the loss wouldn't have been 100
15 percent of the investment. And certainly I can agree no
16 harm, no foul situation, but when there's harm you have to
17 ask whether there's a foul.

18 THE COURT: That's my job.

19 MR. KATZ: And --

20 THE COURT: Let me hear from the counsel --

21 MR. KATZ: -- from --

22 THE COURT: Let me hear -- now that you have as
23 far as I -- my visibility into this is concerned for the
24 first time articulated anything by way of a granular
25 allegation regarding what you mean by unsuitability let me

1 hear from counsel for LBI.

2 Thank you.

3 MS. HOFFER: Well, first, I just would like to
4 address counsel's suggestion that no documentary support
5 needed to be provided because it was not requested. As Your
6 Honor knows, the claim forms that every claimant fills out
7 do request all forms of supporting documentation. And
8 counsel knew enough to file an opposition to our objection.
9 I would think they would know to support that opposition
10 with the relevant facts.

11 Another point, I think, is that nowhere in his
12 papers does the claimant allege that this was a
13 discretionary account and our review of the related
14 documentation suggested it was not, in which case as a
15 matter of law these duties would not exist to, you know,
16 investigate claimant's trades or, you know, what --

17 THE COURT: Do you actually have the underlying
18 agreement between the claimant and LBI?

19 MS. HOFFER: Yes, we do.

20 THE COURT: Counsel, do you have a copy of that?

21 MR. KATZ: No, I don't, Judge.

22 MS. HOFFER: I could provide those.

23 And then, finally, as to the unsuitable trading
24 allegation, Counsel just keeps reiterating the diminution in
25 value, but the case law clearly states that that is simply

1 not enough to support a claim for unsuitable trading.

2 THE COURT: All right. Thank you.

3 Now with respect to -- there also seems to be an
4 attempt to allege a fraud claim. And I need to hear from
5 you whether or not that's true because if there is an
6 attempt to allege a fraud claim, there is a requirement that
7 should be imposed to plead it with the kind of particularity
8 that's required by Rule 9(b) of the Federal Rules of Civil
9 Procedure. In other words, specific statements were made,
10 specific fraudulent misrepresentations were made. And it's
11 unclear to me whether that's, in fact, what's being
12 attempted here.

13 Can you help me out on that question?

14 MR. KATZ: Yes, Judge.

15 I would not want to be involved with an allegation
16 or a list of allegations as to actual fraud committed by
17 either the broker or by Lehman. What was more salient other
18 than fraud are the facts that --

19 THE COURT: Well, hold on. Let me parse your
20 words very carefully. You said you don't want to be
21 involved with that and what's more salient other than fraud.

22 So my question to you is very -- my very pointed
23 question to you is are you or are you not attempting to
24 allege a claim based on fraudulent misrepresentation or any
25 kind of a fraud by LBI?

1 MR. KATZ: No.

2 THE COURT: Okay. So that's off the table?

3 MR. KATZ: That's off the table.

4 THE COURT: So we're only talking about -- we're
5 talking, though, about the application of Rule 9(b) to the
6 unsuitable trading allegation as well. And, clearly, we're
7 at a juncture now where for the first time in real time
8 today we've heard anything about what you really mean by
9 that.

10 So I don't believe that based on what I've heard
11 that you're going to be able to satisfy the heightened
12 pleading requirements that I'm going to make applicable to
13 this, but I'm going to give you an opportunity to try.

14 MR. KATZ: Okay.

15 THE COURT: You need to meet with counsel for LBI,
16 see what documents they have, see if that informs your path
17 going forward, and if there is anything else by way of
18 communication, records, anything that indicates protests or
19 communication or concern in the immediate time frame prior
20 to the time that the loss has actually occurred, that's
21 something that you're going to have to share with the
22 trustee.

23 MR. KATZ: Okay.

24 THE COURT: So I'm going to grant the objection
25 with leave to re-plead only with respect to any alleged

1 unsuitability or negligence claim, not with respect to
2 anything sounding in fraud because you have now clarified
3 that that's not what you're seeking. And the deadline for
4 submitting that will be 45 days from today's date.

5 MR. KATZ: Okay, Your Honor.

6 THE COURT: All right.

7 MR. KATZ: Thank you.

8 THE COURT: Okay. Thank you.

9 Okay. Shall we next go to the two hundred and
10 sixtieth omnibus objection?

11 MR. PACE: Yes, Your Honor. Jordan Pace of
12 Hughes, Hubbard & Reed for the SIPA trustee.

13 The trustee's two hundred and sixtieth omnibus
14 objection is an objection to six claims related to account
15 transfers that were made immediately before LBI's filing
16 date. Only five of the claimants subject to the objection
17 responded.

18 THE COURT: Right.

19 MR. PACE: And these claims together seek
20 approximately \$118 million in close filing date market
21 losses.

22 The basic facts of these claims are the same, and
23 I understand that they're related claimants, too.

24 Each of the claimants submitted an account
25 transfer request within three days of LBI's filing date and

1 an account transfer takes longer than that. The parties --

2 THE COURT: Right. Well, they, themselves sight
3 to the FINRA rules that say four or five days is --

4 MR. PACE: That's correct, Your Honor.

5 THE COURT: -- is not unusual.

6 MR. PACE: So I would note as we noted, I believe,
7 in our objection that both the SEC and FINRA say that it
8 takes longer than that.

9 But the more important point is that there's no
10 issue with the fact that the securities were still at LBI on
11 the filing date. Everyone agrees on that and there's no
12 issue with that. So because the securities were still at
13 LBI on the filing date they became part of the estate and
14 they became subject to a SIPA proceeding.

15 It's also undisputed that each of the claimants
16 received all of their securities and their full filing date
17 net equity through the transfer to Barclays as part of the
18 --

19 THE COURT: Can we -- let's go through -- can we
20 go through the time line day by day?

21 MR. PACE: Sure.

22 THE COURT: Okay. So it starts with -- it seems
23 as if it starts with a direction to Goldman, right, at least
24 on behalf of one of the claimants, right?

25 MR. PACE: In the example that's provided a form

1 is --

2 THE COURT: Right.

3 MR. PACE: -- is submitted --

4 THE COURT: A form is submitted --

5 MR. PACE: -- to Goldman.

6 THE COURT: -- to Goldman, right?

7 MR. PACE: Uh-huh.

8 THE COURT: And then Goldman turns around and

9 submits a TIF, I think, to --

10 MR. PACE: To NSCC.

11 THE COURT: -- to NSCC, right?

12 MR. PACE: Yes.

13 THE COURT: It's a lot of alphabet soup here --

14 MR. PACE: It is.

15 THE COURT: -- right? So then -- and then at that
16 point where the -- it's -- that begins on September 16th,
17 right?

18 MR. PACE: The submission -- the allegation is
19 that there was a submission to Goldman Sachs on September
20 16th. We don't know at what time of the day. We don't know
21 when that comes over to --

22 THE COURT: Okay.

23 MR. PACE: -- LBI. There's not an allegation --

24 THE COURT: I thought there was an allegation that
25 the request I'll call it to LBI is as of September 19th, the

1 Friday?

2 MR. PACE: The --

3 THE COURT: The request for the transfer.

4 MR. PACE: The request for the transfer to happen?

5 THE COURT: Yes.

6 MR. PACE: Well, so --

7 THE COURT: The new authorization.

8 MR. PACE: So the authorization, the transfer
9 instruction form in the example that's provided, it comes in
10 on September 16th to Goldman Sachs.

11 THE COURT: To Goldman.

12 MR. PACE: How it comes into LBI, if it came in on
13 the 16th or the 17th, a request for a transfer is not a
14 request for a transfer on a specific date.

15 THE COURT: I understand that. I thought that
16 there was allegation somewhere that it was good to go on the
17 19th.

18 MR. PACE: I don't recall such an allegation and
19 under even the claimant's allegations --

20 THE COURT: All right.

21 MR. PACE: -- of the FINRA rules --

22 THE COURT: So --

23 MR. PACE: -- that would be an --

24 THE COURT: So here it is. It's --

25 MR. PACE: -- impossibility.

1 THE COURT: -- it's paragraph 23. On the same
2 day, Tuesday, the 16th, Goldman Sachs initiated appropriate
3 instructions to LBI through the ACAT (ph) system that LBI
4 should immediately transfer to it the entire contents of
5 General Orrs (ph) brokerage account. On Thursday, September
6 18th LBI provided notice through the ACAT system that it had
7 validated General Orrs' account transfer and that the
8 securities in General Orrs' LBI account were slated for
9 transfer and delivery to Goldman.

10 Okay. So then -- now we're up to Friday, right,
11 where the board authorized the commencement of the
12 proceeding and then on Friday, the 19th, the SIPA case was
13 filed, right?

14 MR. PACE: Yes.

15 THE COURT: All right. So that's the timeline.
16 And then on Friday night the sale was approved, right?

17 MR. PACE: Yes.

18 THE COURT: So that's Friday, the 19th, and the
19 sale order was entered on Saturday, the 20th, right, in the
20 wee hours of the morning --

21 MR. PACE: Yes.

22 THE COURT: -- right?

23 So then I guess -- and then the trustee sends out
24 a letter to NCSS ACATS saying we're transferring everything
25 pursuant to the sale, right?

1 MR. PACE: Yes.

2 THE COURT: If I -- I'm not -- if I'm wrong you
3 should tell me. I'm just -- I'm trying to focus very finely
4 on the day by day events.

5 MR. PACE: Your Honor, I would just note that, to
6 put it in context, that there's a lot going on during those
7 days --

8 THE COURT: Yeah.

9 MR. PACE: -- including with DTC (ph) and --

10 THE COURT: I think everyone would stipulate to
11 that.

12 MR. PACE: -- NFCC (ph).

13 THE COURT: Right. Right. But what I'm trying to
14 get at is that the allegation seems to be that
15 notwithstanding the commencement of the SIPA proceeding and
16 notwithstanding the entry of the sale order, that LBI should
17 not have done anything to countermand the process that it
18 started through the notice to the -- through the ACAT system
19 to transfer General Orr securities.

20 MR. PACE: Sure, Your Honor. To address that,
21 starting September 19th it's not LBI anymore, of course,
22 it's the trustee.

23 THE COURT: Right.

24 MR. PACE: And the paragraph that your paragraph
25 cited to in the response, the validation is a preliminary

1 step in the account transfer process. That's -- according
2 to the FINRA rule that happens generally within one day, but
3 that's not the end of it. That doesn't mean that the
4 securities are ready to go.

5 If that were the case, then that would be the end
6 of it and they would just take one day. But there's more to
7 be done. And there are more steps that would be required to
8 be taken by LBI or --

9 THE COURT: The trustee.

10 MR. PACE: -- theoretically the trustee.

11 THE COURT: But the -- but I think the allegation
12 is -- and obviously I'll hear from the claimants that the
13 SIPA order allowed certain businesses usual to continue,
14 including a transfer that was in process and that,
15 therefore, the trustee has liability for having
16 countermanded the transfer or ended the transfer that was in
17 process. That seems to me to be the crux of the allegation.

18 MR. PACE: Yes, Your Honor. That's in some way --
19 in many ways the allegation. But there are two points on
20 that.

21 First is if it's something that the trustee did,
22 if the claimants are saying that it's because the trustee
23 stepped in and did something, they've specifically stepped
24 away from that by distinguishing the -- it's Judge
25 Garretty's Adler Coleman case where the claimants said that

1 the trustee is liable because of very similar facts.

2 They're not saying that. They're saying that the
3 LBI estate is liable. And, yes, the liquidation order did
4 allow for certain limited continuation of business, but
5 that's in the context of the SIPA proceeding. That's in the
6 context of hundreds of thousands of customer accounts.
7 That's in the context of SIPA says to the trustee, your job
8 is to, as promptly as possible, satisfy net equity claims,
9 as promptly as possible makes sure that there's as little
10 disruption to investors as possible. And one of the ways
11 that you can do that is to transfer accounts to Barclays, to
12 do a bulk transfer as happened.

13 So in this context the trustee under SIPA is
14 required to look at the hundred thousand accounts, not just
15 these five accounts. It's required to do that. And the
16 transfer, including the transfer of the claimants' accounts,
17 was approved by Judge Peck in his order.

18 THE COURT: Well, that's a critical point and one
19 that doesn't seem to be squarely addressed and, in fact,
20 it's only mentioned in passing in your papers; that even if
21 you could look at SIPA and the orders that were entered in
22 connection with the SIPA proceedings, as of the early
23 morning hours of September 20th the assets were sold. The
24 account -- they were sold. Another process, court-approved
25 and court-sanctioned was beginning to take place.

1 MR. PACE: That's correct, Your Honor.

2 THE COURT: So that's -- obviously I'll talk to
3 the claimants about that. But that seems to me to be a very
4 pivotal -- to be a pivotal fact.

5 MR. PACE: That is, Your Honor, and that and SIPA,
6 they're the forest, but when we get into the trees there's
7 just no legal claim here. We've put that in our papers. I
8 won't rehash it, but I think that's where we stand.

9 THE COURT: Okay. Let me hear from the claimants.
10 Good morning, Mr. Parry. How are you?

11 MR. PARRY: Good. How are you, Your Honor?

12 THE COURT: Good.

13 MR. PARRY: It's a pleasure to appear before you.
14 Mark Parry of Moses & Singer. I'm here to introduce David
15 Farrell and his partner, Warren Dean, from the firm --

16 THE COURT: Okay.

17 MR. PARRY: -- Thompson Coburn who will address
18 the argument on --

19 THE COURT: Okay.

20 MR. PARRY: -- behalf of the claimants.

21 THE COURT: Very good. Thank you.

22 MR. FARRELL: Good morning, Your Honor.

23 THE COURT: Good morning. How --

24 MR. FARRELL: David Farrell --

25 THE COURT: -- are you?

1 MR. FARRELL: -- on behalf of the claimants.

2 THE COURT: So can you just clarify the claim
3 seems to seek losses for the time period after, without
4 doubt, the accounts were at Barclays.

5 MR. FARRELL: Yeah. And --

6 THE COURT: How could that be?

7 MR. FARRELL: There may be -- and I don't -- Your
8 Honor, I guess the best way for me to address that issue,
9 there may be issues regarding the extent of our damages,
10 whether -- and perhaps the trustee can make an argument that
11 at that point in time we had an obligation to mitigate our
12 damages by --

13 THE COURT: No. No. No. I'm -- at some point
14 the accounts went to Barclays.

15 MR. FARRELL: Correct.

16 THE COURT: So the accounts going to Barclays
17 whether or not in the fog of the entire situation Barclays
18 might have been able to immediately liquidate the securities
19 or transfer them to Goldman or wherever else. Once the
20 accounts leave LBI and go to Barclays LBI is done --

21 MR. FARRELL: Right.

22 THE COURT: -- right? So to me it's a significant
23 matter when you have access to that data. You know -- it's
24 knowable the date on which the accounts hit Barclays. You
25 can't file a proof of claim that's meritless to that extent.

1 I mean, that's kind of a big deal to me. So --

2 MR. FARRELL: Right.

3 THE COURT: -- that's completely off the table.

4 The moments the accounts hit Barclays and LBI was legally
5 without any ability to do anything with respect to these
6 accounts, that's not even arguably on the trustee's or LBI's
7 watch.

8 MR. FARRELL: Yeah. And I -- if I may, Your
9 Honor, I think there's a misunderstanding about really what
10 the nature of our claim is.

11 THE COURT: Okay.

12 MR. FARRELL: And here's -- to put it in a
13 nutshell, we -- our position is -- we equate our position as
14 being essentially identical to any party that is in a
15 position of having a pre-commencement obligation that is
16 owed by the debtor --

17 THE COURT: Right.

18 MR. FARRELL: -- okay, and just to -- if I can take
19 a minute to just --

20 THE COURT: Sure.

21 MR. FARRELL: -- walk you through the time
22 sequence again.

23 And as you properly identified, Your Honor, your
24 clients submitted transfer instructions pre-commencement.
25 And if I can just take -- we take exception that in their

1 reply the trustee asserts that, you know, we did that
2 because we knew that the brokerage firm was going to file.
3 That is completely an unfounded allegation.

4 THE COURT: But it might have been. So what,
5 right?

6 MR. FARRELL: Well, it -- but it's -- I mean, we
7 take exception to that because it -- I mean, this had -- the
8 transfer had been in works for several weeks and it was
9 precipitated by the facts that the individual we were
10 working with out of Lehman had switched brokerage firms and
11 that's -- that was the reason for the move. And I realize
12 for today's purposes that that may be irrelevant, but I just
13 wanted to take exception on the record to the assertion that
14 we were somehow trying to opt out of the impending --

15 THE COURT: Okay.

16 MR. FARRELL: -- insolvency. I mean, no one knew
17 that the brokerage firm -- and, in fact, I think at the time
18 they were advertising that the brokerage firm was not going
19 to be part of the bankruptcy. But in any event let's get
20 back to the important timeline.

21 So we submit our transfer instructions pre-
22 commencement. Those are received by the debtor pre-
23 commencement. At that point in time --

24 THE COURT: By LBI. Actually they're not a
25 debtor.

1 MR. FARRELL: Okay. LBI.

2 THE COURT: Right.

3 MR. FARRELL: It's received by LBI. That --

4 THE COURT: What date are we talking about now?

5 MR. FARRELL: We're talking about essentially
6 either the 17th or 18th of September.

7 THE COURT: Okay.

8 MR. FARRELL: Before the commencement of the SiPC
9 proceeding. That creates a duty on the part of LBI to honor
10 that transfer instruction.

11 THE COURT: Sure.

12 MR. FARRELL: We can talk about the sources of
13 that duty in a minute, but --

14 THE COURT: Okay.

15 MR. FARRELL: -- it clearly created a duty.

16 So, then, the -- and then LBI, in accordance with
17 that duty, takes steps to consummate that transfer, but
18 intervening we have the board of LBI saying, hey, we consent
19 to a SiPC proceeding, SiPC proceeding's commenced and the --
20 and a trustee is appointed.

21 Now the trustee at that point in time has a
22 decision. I can continue to honor the debtors' -- what's
23 now the debtors' pre-commencement duty to transfer these
24 securities or I can repudiate that and take some other
25 course of action.

1 THE COURT: But you're skipping a couple of
2 important facts. It's not just any old trustee. It's a
3 SIPA trustee and SIPA applies. So the trustee can't just
4 come up with his own game plan under then existing law. The
5 trustee has to follow the requirements of SIPA and at that
6 point in your time line, in your time line in which you're
7 still well within the, I'll call it ordinary window to
8 effectuate the transfer of accounts, the account -- the sale
9 order is entered.

10 MR. FARRELL: Right.

11 THE COURT: Right?

12 MR. FARRELL: Yeah. But --

13 THE COURT: The sale order is entered.

14 MR. FARRELL: But the prime of that time and even
15 apparently at some point afterwards that the ACATS were
16 continuing to be processed during that time period. So the
17 trustee -- and as you pointed out the order appointing the
18 trustee gives -- gave the trustee flexibility to continue to
19 conduct this --

20 THE COURT: I didn't say that.

21 MR. FARRELL: Well --

22 THE COURT: I didn't say that. I said that the --
23 certain provision of SIPA arguably enable the trustee to
24 continue to conduct --

25 MR. FARRELL: And we would --

1 THE COURT: -- some business.

2 MR. FARRELL: Right.

3 THE COURT: I don't know -- I don't know if
4 whether this falls into this category.

5 MR. FARRELL: Right. Well, we would submit that
6 the order appointing him did allow the trustee to continue
7 to conduct business.

8 So the trustee had a choice. And I -- we
9 understand that the trustee -- just like a Chapter 7
10 trustee, that SIPA requires the trustee to do what's in the
11 best interest of the estate and, in particular, in a SIPA
12 proceeding to get the brokerage accounts to another -- to a
13 solvent broker as quickly as possible.

14 And so the trustee said, well, I'm going to make a
15 decision here. I'm not going to honor the -- you know,
16 initially he allows the ACATs to be honoured, but,
17 essentially -- eventually he takes the decision, well, I'm
18 not going to. I'm going to stop. I'm going to reject those
19 pending ACATs' requests and instead I'm going to transfer
20 all these brokerage accounts to Barclays because I think
21 that's the best decision to do.

22 THE COURT: Well, it -- but I don't think I agree
23 with your characterization. There was a sale order entered
24 on September 20th prior to in -- what -- there was a sale
25 order entered --

1 MR. FARRELL: Correct.

2 THE COURT: -- that required, that sold the
3 accounts to Barclays, that required the trustee to --

4 MR. FARRELL: Well --

5 THE COURT: -- take steps to consummate the sale,
6 pursuant to the sale order, and effectuate the transfers
7 pursuant to SIPA.

8 MR. FARRELL: Well, the trustee supported it.
9 That was a relief that the trustee supported.

10 THE COURT: So how can there be a cause of action
11 for the trustee complying with an order of court and SIPA?
12 How could there be a cause of action --

13 MR. FARRELL: Well --

14 THE COURT: -- to that?

15 MR. FARRELL: -- we're not saying that the trustee
16 did anything improper. As far as we know the trustee did
17 exactly what he was supposed to do.

18 THE COURT: Okay. But what is the duty that --
19 what did LBI do --

20 MR. FARRELL: Well, our position is no different
21 from anybody who's party to any kind of executory contract
22 or executory obligation that existed as of the petition
23 date. Trustee's appointed, trustee says, hey, I can't honor
24 that. I've got more important things to do. I've got to
25 tell these brokerage accounts I'm going to dishonour the

1 debtors' pre-existing duty to transfer those.

2 And what do we tell the party in that position,
3 the non-debtor party who's executory obligation is not
4 performed? We tell that party, hey, you -- you're not
5 without any recourse. You get to file a general unsecured
6 claim against the bankruptcy estate for any harm that you
7 suffered as a result of the debtors' pre-commencement
8 obligation not being honoured. And that's all we're asking
9 to do. We're just simply saying, hey, the debtor owed us a
10 pre-commencement obligation. You had to dishonour it. We
11 -- that's fine. We understand. Your fiduciary duty dictated
12 that you dishonour that. But that doesn't mean we don't
13 have any recourse because that -- as a result of the non-
14 performance of that pre-commencement obligation. We have a
15 right to file a general unsecured claim.

16 Does -- will it - you know, we realize that we'll
17 get paid in bankruptcy dollars, pennies on the dollar or
18 whatever, but, you know, that -- we are at least entitled --
19 I mean, that's kind of fundamental bankruptcy law. The non-
20 debtor parties to executory obligations, you know, they --
21 we don't have a right to come and assist that those be
22 performed; that the trustee ignore his fiduciary duty. He's
23 got to do his fiduciary duty. But we are -- the -- you
24 know, it's fundamental bankruptcy law that we have some
25 recourse and that recourse is filing a general unsecured

1 claim against the estate.

2 THE COURT: I hear the words, but I don't hear
3 what the claim is. I hear the words, but I -- I have --
4 only last week or perhaps the week before I heard another
5 argument related to the -- a hung transfer and there's no
6 claim there.

7 MR. FARRELL: Well, what happened to the debtor --
8 I guess the question is what happened to the debtors' pre-
9 commencement duty to transfer our securities? Did that just
10 -- the minute they filed that just vaporized, that just
11 disappeared and never -- as if it never existed?

12 THE COURT: Well, it was superseded by the court
13 order --

14 MR. FARRELL: Yeah. It --

15 THE COURT: -- selling the assets.

16 MR. FARRELL: It's -- it superseded it, but it
17 doesn't go away. I mean --

18 THE COURT: The -- because as you admit that in
19 the ordinary course of business the transfer would have
20 taken at least four or five days from the time you initiated
21 it. All right. So then things happened that caused that
22 transfer to not be able to occur.

23 You didn't -- we're not talking about -- you,
24 yourself, at the top of the hour said this had been in the
25 works for a while because our point person left Lehman.

1 We're not talking about a situation in which this transfer
2 was hung, if you will, for three weeks or four weeks or five
3 weeks. The transfer was initiated in the turmoil of the
4 second and into the third week of September 2008. SIPA
5 proceeding was commenced. The sale order was entered, and
6 the accounts went with the rest of the accounts.

7 And I'm just finding it hard to understand how the
8 estate could be liable for having acted in accordance with
9 SIPA and with the sale order.

10 Let me give you an example. So if there's a
11 suspension of trading and there are market losses during the
12 suspension of trading by -- because of SIPA, there can't be
13 any liability associated with that. SIPA happens.

14 MR. FARRELL: I understand that. And so does
15 bankruptcy and so do -- and executory contracts get rejected
16 every day. Bankruptcy happens. Trustee says, hey, I know
17 the debtor had a pre-existing duty to do something to you,
18 but guess what? I have to act for the fiduciary interest of
19 all creditors and I'm not going to perform your pre-existing
20 -- I'm not going to perform the debtors' pre-existing
21 obligation, and that's exactly what happened here. The
22 trustee came in and said, hey, I've got Barclays over here
23 that's paying me lots of money to -- and paying the estate
24 lots of money to -- if I transfer your brokerage account to
25 them. So I know you want our account at Goldman Sachs, but

1 I'm not going to do it and I'm not going to do it because
2 it's not in the best interest of the estate. And we fully
3 appreciate that.

4 But the fact of the matter is bankruptcy does not
5 leave a client in my position who's owed a pre-commencement
6 obligation, doesn't say --

7 THE COURT: That's --

8 MR. FARRELL: -- you --

9 THE COURT: For the --

10 MR. FARRELL: -- it does not say you don't have
11 any recourse whatsoever.

12 THE COURT: For the sake of narrowing down the
13 scope of what you're seeking, okay, so, hypothetically, the
14 -- hypothetically you say the trustee should have followed
15 up, allowed the ACAT transfer --

16 MR. FARRELL: No.

17 THE COURT: Hold on. Should have not
18 countermanded.

19 MR. FARRELL: We're not saying that.

20 THE COURT: Okay. What are you saying then?

21 MR. FARRELL: I'm saying -- I'm -- and I think I'm
22 not -- obviously I'm not doing a good job of communicating
23 this. I -- we fully understand that once the trustee is
24 appointed --

25 THE COURT: Okay. So they shouldn't --

1 MR. FARRELL: -- he had to act in the best
2 interest of the estate. And if that meant rejecting some of
3 the debtors' pre-petition --

4 THE COURT: Okay.

5 MR. FARRELL: -- obligations, just like --

6 THE COURT: Okay.

7 MR. FARRELL: -- trustees do all the time.

8 THE COURT: All right.

9 MR. FARRELL: If he had to reject that --

10 THE COURT: I got it.

11 MR. FARRELL: -- then he was absolutely --

12 THE COURT: Okay.

13 MR. FARRELL: -- correct in doing that.

14 THE COURT: Okay. But you want to be compensated
15 for that.

16 MR. FARRELL: We want to assert a general
17 unsecured claim --

18 THE COURT: Okay. So let's --

19 MR. FARRELL: -- like -- just like any other --

20 THE COURT: So --

21 MR. FARRELL: -- party to a rejected contract.

22 THE COURT: So let's just try to cabin it, okay?

23 MR. FARRELL: Okay.

24 THE COURT: So in your scenario the transfer would
25 have gone through, right? In your scenario the transfer

1 should have gone through? You --

2 MR. FARRELL: In our --

3 THE COURT: I'm backing you -- I'm trying to back
4 you up, not back you into a corner. I'm trying to back up
5 into a time frame for the calculation of your alleged
6 damages without -- putting to one side a duty and liability.

7 MR. FARRELL: Okay.

8 THE COURT: And what I'm suggesting to you is that
9 you would have to establish that the transfer would have
10 gone through on X date.

11 MR. FARRELL: Correct.

12 THE COURT: Okay.

13 MR. FARRELL: Right.

14 THE COURT: Okay. So it wasn't until Thursday the
15 18th that LBI provided the notice through the ACAT system.
16 That's Day One, right?

17 MR. FARRELL: Correct.

18 THE COURT: So let's say five business days.

19 MR. FARRELL: No. It was initiated on --

20 THE COURT: Yes.

21 MR. FARRELL: -- it was initiated on the 16th. It
22 was received by LBI -- that --

23 THE COURT: Right.

24 MR. FARRELL: The five days would really start --
25 from my calculation would start running on the 16th. From

1 start to finish in ACAT's process normally takes five
2 business days from start to finish.

3 THE COURT: Okay. For the sake of my point I will
4 -- we can start there.

5 MR. FARRELL: Okay.

6 THE COURT: But the four or five days, one would
7 really have to -- really going far down the road you would
8 have to actually establish or provide evidence of what it
9 actually is. That's like a recommendation. Let's just say
10 five days --

11 MR. FARRELL: Okay.

12 THE COURT: -- just for the --

13 MR. FARRELL: Okay.

14 THE COURT: -- sake of this. So Tuesday,
15 September 16th is day one, the fifth business day is Monday,
16 September 22nd.

17 MR. FARRELL: Correct.

18 THE COURT: Right. All of the accounts were at
19 Barclays no later than September 29th.

20 MR. FARRELL: Correct.

21 THE COURT: Okay. So what's the number that's
22 associated because as of September 29th LBI is done,
23 unquestionably done, or -- and that's the outside date and I
24 don't have familiarity with the mechanics of the transfers.
25 I don't know if they go over in lots or -- I don't know how

1 they do. But for the sake of argument let's say the 29th.

2 So the 22nd to the 29th, those are the outside
3 dates of any damages that you could allege, whatever the
4 securities were worth on the 22nd and the delta between that
5 and whatever they were worth on the 29th.

6 And from there I would suggest to you that it
7 could only be narrowed because, as a matter of fact, it
8 might have taken longer to transfer a day or two say and
9 that I would suggest to you wouldn't give rise to liability
10 on behalf of the transferring broker because things just
11 take longer. I'm making this up. I'm just trying to
12 demonstrate the point.

13 Then we know that no later than the 29th
14 everything was at Barclays. LBI could do -- and the trustee
15 couldn't do anything. It was on Barclays, right?

16 MR. FARRELL: Correct.

17 THE COURT: Perhaps the accounts got there
18 earlier. We don't know. I'm curious as to what the delta
19 is in the -- what the market loss is over that period of
20 time because it's probably a lot smaller than what the
21 market loss is between your starting point and October 22nd,
22 2008 because --

23 MR. FARRELL: Yeah.

24 THE COURT: -- I can remember --

25 MR. FARRELL: And --

1 THE COURT: -- the sinking feeling that everyone
2 had in their stomachs during that period of time. So --

3 MR. FARRELL: That's a fair point, Your Honor.

4 And that --

5 THE COURT: Thank you.

6 MR. FARRELL: And that, you know, that may go to
7 the fact of, you know, our ability to demonstrate our
8 damages. But, I mean, I think -- and I don't want to make
9 light of that point. I think it's an important point. But,
10 I mean, obviously, we're here today to address the -- you
11 know, the issue of whether or not we have a claim at all as
12 it's a sufficiency hearing, and which goes back to the --
13 you know, the discourse we were having earlier as to whether
14 or not, you know, my clients have any claim whatsoever.

15 And, you know, again, I -- my point is that the
16 debtor had a prepetition duty. That duty, we understand the
17 trustee had to make the decision and we have no reason to
18 believe, no reason whatsoever to believe that he didn't make
19 the absolutely right decision as a fiduciary that he was not
20 going to honor that pre -- I'll call it a prepetition duty.

21 But, you know, it's Bankruptcy 101 that when a
22 debtor's prepetition duties are not honoured, the party to
23 whom those obligations are owed are entitled to at the very
24 least file a general unsecured claim for any damages that
25 they can demonstrate flowed as a result of the non-

1 performance of that prepetition obligation.

2 THE COURT: Okay. All right. Let me hear from
3 the trustee again.

4 MR. PACE: Your Honor, I guess the overall point
5 is that we're not in Bankruptcy 101. We're in SIPA. We're
6 in the situation where congress specifically established a
7 regime to deal with securities that are in the estate. And
8 these securities, there's no dispute that they were in the
9 estate; that they were customer property; that they had to
10 become a part of the fund of customer property.

11 The -- Counsel's reference to a prepetition duty,
12 what is that prepetition duty? We've put in our papers --

13 THE COURT: Well, I think the prepetition duty is
14 that they lodged a request to transfer the funds; that even
15 if the commencement of the SIPA proceeding and/or the sale
16 order prevented that from happening, that the failure to
17 transfer gives rise to their claim for damages associated
18 with the failure to transfer the cost. In other words, the
19 cost of complying with SIPA and with Judge Peck's order is a
20 rejection damage claim -- is a damage claim. I think that's
21 what they're saying.

22 MR. PACE: Sure. If there's -- in order for there
23 to be a rejection damage claim there has to be a contract.
24 There's no contract alleged here. There's no fiduciary duty
25 because the UCC says that there's no fiduciary duty. And

1 then the UCC, which is -- that governs pre -- that governs
2 contractors that says that once you hit that wall of
3 insolvency all bets are off. Your UCC duties don't apply
4 anymore. We look to SIPA.

5 The revised Article VIII was enacted in 1997.
6 That's 27 years after SIPA was enacted. That's 27 years of
7 experience of this is what happens in a SIPA proceeding.
8 There's nothing in the UCC about you get a claim. It's that
9 your accounts and your --

10 THE COURT: So what governs -- what governs is the
11 prime brokerage -- is there a prime brokerage agreement that
12 governs this situation as between LBI and these claimants?

13 MR. PACE: Your Honor, in operation it's the UCC,
14 but the UCC --

15 THE COURT: What I'm trying to get at is that I
16 know that under the prime brokerage agreement there can be
17 no liability for suspensions in trading as a result of
18 forced mature events. I'm just trying to struggle with the
19 notion that the SIPA proceeding came into existence and
20 there doesn't seem to be a connecting up by the claimants
21 between that event and the failure to transfer the accounts.
22 I'm just having a hard time understanding it.

23 MR. PACE: Your Honor, we don't know what the
24 agreement says, if there was an agreement because there are
25 no allegations about the agreement.

1 But, you know, there was discussion with counsel
2 -- between Your Honor and counsel about, you know, different
3 dates when it should have been -- when it should have not
4 been allowed. The larger point is that they received their
5 securities. They received all of the securities in their
6 account. They received their filing date and that equity.
7 And every single customer would love it if their securities
8 happened to go down, that they could recover from the
9 general estate for that market loss.

10 I was before Your Honor in November of precisely
11 such a claim. And the rule is, that Your Honor expressed
12 and that Judge Glenn has expressed, that you don't get
13 market loss post-filing in a SIPA proceeding.

14 THE COURT: But here the -- but, yes. I've said
15 that. Judge Peck has said that. Judge Glenn has said that
16 and I'm not backing away from that.

17 But here what I'm struggling with is the different
18 allegation that we wanted our account. We gave an
19 instruction to transfer our account. Notwithstanding SIPA,
20 the commencement of the SIPA proceeding and the entry of the
21 sale order we should be compensated for the failure to
22 transfer. That's what they're saying.

23 So in the absence of a fail -- in the absence of a
24 request for transfer, then we fit neatly into the bucket of
25 the rule of no claim for market losses. Here the allegation

1 seems to me to be different that we wanted a transfer and
2 you could have transferred it. Even if you were prevented
3 from transferring it we still have a claim. So why
4 shouldn't I let them survive a sufficiency hearing on that
5 very, very narrow allegation of a claim -- of liability?

6 MR. PACE: Your Honor, I keep returning to the UCC
7 because the UCC is really the central thing here and it says
8 that if the -- if the securities intermediary, if LBI is not
9 available to perform because it's insolvent, then the UCC,
10 the obligations under the UCC don't apply anymore. That
11 prepetition obligation doesn't apply anymore.

12 The -- and I would note that UCC 8508, that's not
13 an obligation without reservation to transfer securities.
14 That's an obligation to act in a commercially reasonable
15 manner up until the filing date. When the filing date
16 happens, you look to SIPA. That's how it's handled.
17 There's nothing in the UCC that says that just because you
18 made an instruction or you made a request you are
19 unconditionally guaranteed no matter what.

20 THE COURT: But your position is that once the
21 SIPA proceeding was commenced it's -- SIPA superseded any
22 application of the UCC.

23 MR. PACE: It's not just that it superseded it.
24 It's that the UCC stopped dead in its tracks.

25 THE COURT: Right. Yeah. SIPA became the

1 governing set of rules.

2 MR. PACE: Yes. But even if the UCC --

3 THE COURT: Even if the UCC applied.

4 MR. PACE: Even -- well, even if the UCC applied
5 post-filing date, there's that 8509 part that says if you
6 comply with another statute rule or regulation that governs
7 the same subject matter, transfer of accounts, which SIPA
8 undoubtedly does, then you're fine under the UCC.

9 So it's kind of an all roads lead to Rome
10 situation here. Whether it's that the UCC stops at the
11 filing date, which it says it does or it goes on, there's no
12 claim here, Your Honor.

13 THE COURT: Okay. Thank you.

14 MR. PACE: Thank you.

15 MR. FARRELL: Your Honor, if I may be heard?

16 THE COURT: Yeah. I mean, it does -- you are kind
17 of in a labyrinth because of the particular timing and it
18 gets you to that point where the operation of SIPA is
19 inconsistent with the assertion of a claim for the failure
20 to transfer.

21 MR. FARRELL: I -- Your Honor, I would respond to
22 that by saying that I think it is SIPA presents a roadblock
23 in terms of our ability to insist that post-commencement the
24 trustee was obligated to honor our transfer requests.

25 In other words, let's say that the -- let's say we

1 rushed into the court in the first days of the case, right
2 as the sale order was being considered and we said, no, Your
3 Honor. Don't allow the trustee to-- at least carve out our
4 accounts and insist that the trustee honor our pending
5 ACAT's request.

6 THE COURT: Okay. So that -- let me take you up
7 on that. You could have gone to the sale hearing and said,
8 I don't want my accounts to go. Carve me out from the sale
9 order and let's enforce the pending ACAT's transfer. You
10 could have done that.

11 MR. FARRELL: I could have done that. And I think
12 -- and what the trustee would have said in that situation
13 is, no. I've got a fiduciary duty. It's in the best
14 interest of the estate to transfer all these --

15 THE COURT: Okay. But now here we are these many
16 years later and that objection -- so we're in this
17 hypothetical land where you're saying, the trustee didn't
18 have to transfer. The trustee just wanted to transfer the
19 claims with the rest of the accounts -- with the rest of the
20 accounts to Barclays. The trustee could have, you know,
21 corded them all. And you could have come in at the sale
22 hearing and said, I'm not going to Barclays. I'm going to
23 Goldman Sachs. Carve me out.

24 MR. FARRELL: Well, in fact, it's not
25 hypothetical, Your Honor, because the AATs and we allege

1 this very clearly in our pleadings that the ACATs continued
2 to get honor and it was only -- not until the following
3 Monday, the following Monday sale -- as you pointed out the
4 sale was approved late in the wee hours on Saturday.

5 It was the following Monday the trustee and
6 Barclays get together and they send a letter to DTC and the
7 NSCC and say, hey, wait a minute. Put a hold on those
8 ACATs. We're figuring out what to do. And then the next
9 day they say, well, we think we've figured out a procedure.
10 We want it verified by the -- that we're going to go through
11 this elaborate process where we -- before we honor this
12 ACATs we're going to just -- we're going to verify that
13 they're correct.

14 And then the following day they say, no. We've
15 decided all bets are off. We're putting a stop to the
16 ACATs. So we know what the trustee's position is. The
17 trustee ultimately decided it's going to frustrate his
18 efforts to consummate the sale to Barclays if he's stuck, if
19 he continues to honor these ACATs.

20 And so, you know, again, those are decisions that
21 the trustee -- we're not -- we're --

22 THE COURT: I understand. I absolutely understand
23 what you're saying, but I'm coming up against a roadblock of
24 what's been stated time and time again in this case, stated
25 at least once by Judge Glenn in MF Global is that I hear all

1 the words. I hear UCC, but then SIPA comes into effect,
2 right, and that becomes the operative regime and --

3 MR. HORWITZ: Right.

4 THE COURT: -- that there's no basis for a claim
5 under SIPA or the Bankruptcy Code because all of the
6 securities were transferred. The trustee has satisfied all
7 claims under Section 78(fff)(2)(f), an that there is no
8 additional claim for decline in value or lack of access
9 associated with that period of time. That's been the clear
10 ruling of Judge Peck on at least one occasion and you're
11 asking me to depart from that and --

12 MR. FARRELL: Well --

13 THE COURT: -- I'm really struggling with that.

14 MR. FARRELL: Okay. Well, I'll try to help you.

15 First of all, SIPA doesn't -- SIPA -- in terms of
16 the claims allowance process for general unsecured claims it
17 incorporates by reference Chapter 5 of the Bankruptcy Code.
18 So that's -- you know, in that regard we're dealing with
19 normal Chapter 5 provisions of claims allowance under 502.

20 So the notion that, you know, I keep coming back
21 to this -- to this point that I guess -- and I don't -- I
22 can't speak to all the various contexts in which you've
23 pronounced the issue that, hey, if you get your securities
24 you didn't have any further complaints. I would guess that
25 most of those cases are ones where people are just

1 dissatisfied of the fact that they had to sit around and
2 wait for two weeks while the SIPA proceeding took place
3 because their securities moved to -- eventually moved over
4 to Barclays.

5 And I -- I'm in complete agreement that the case
6 law is very clear that there are no -- you can't come in and
7 assert a claim, either a customer claim or a general
8 unsecured claim, for the mere fact that during the SiPC
9 proceeding you were delayed access to your securities. That
10 -- that's black letter law. Okay.

11 But that's not our situation. We're not alleging
12 that, hey, we -- we're filing a claim cause we had to -- our
13 only grievance is that we had to sit around and wait while
14 the SIPA proceeding. We're claiming that we were owed a
15 duty. Unlike other folks that didn't submit transfer
16 requests prepetition, we submitted a transfer request
17 prepetition. That gave rise to a duty, a duty on behalf of
18 LBI. That duty did not just simply vaporize the minute that
19 the SiPC proceeding was commenced.

20 Sure. It was superseded that -- the trustee has
21 superseding duties. He has fiduciary duties. He has to --
22 you know, he may not be able to honor those consistent with
23 his fiduciary duty and ultimately in this case he didn't.

24 But, again, that doesn't mean -- that duty doesn't vanish --

25 THE COURT: But for you to prevail on that theory,

1 which I don't necessarily agree with you, again, we get back
2 to commercial reasonableness. We get back to the time
3 frame, and we get back to the fact that in actuality you're
4 looking at a very, very narrow window of time.

5 MR. FARRELL: That may be --

6 THE COURT: Very narrow window of time.

7 MR. FARRELL: That may be, but I still contend,
8 Your Honor, that there was a duty that was not performed
9 here and we have the basis for a general unsecured claim.

10 Now opposing counsel makes mention that under
11 their construction of Article VIII that a duty arises, but
12 as soon as the -- as soon as the SIPA proceeding is
13 commenced Article VIII provides that that right just totally
14 vaporizes, just totally disappears.

15 That's a point that they only raise in their reply
16 brief. It's a complicated issue. The standing order in
17 this case didn't allow -- doesn't permit us to file a
18 surreply unless we get your permission. I guess if Your
19 Honor --

20 THE COURT: See, that's exactly it. The duty is
21 super -- the duty under the UCC is superseded by SIPA. So
22 you're asking me to give you a claim notwithstanding the
23 operation of SIPA. And that's a real stumbling block for
24 me.

25 So let's try to wrap it up. You can tell me what

1 that note from Mr. Parry says --

2 (Laughter)

3 THE COURT: -- or not.

4 MR. FARRELL: Let me read it first, please.

5 (Pause)

6 MR. FARRELL: Well, I think -- he makes a very
7 good point that -- I mean, there's a claim for a prepetition
8 -- a failure to perform a prepetition duty. Okay. And what
9 happens post-petition, his point is that that doesn't
10 matter. It's you still have a claim as a result of the
11 breach of that prepetition duty.

12 And I think it just -- essentially, I think that
13 argument dovetails with the fact -- I mean, you cannot deny
14 the fact that two seconds before the SIPA proceeding was
15 commenced debtor owed us a duty. The SIPA proceeding is
16 commenced. That duty just -- it doesn't vaporize. The
17 trustee had a choice whether to continue to honor that or
18 not. He made -- in accordance with his fiduciary duty he
19 made the decision that it's not going to be honoured, just
20 like trustees all the time say, I'm not going to honor the
21 debtor's executory obligation. I've weighed the risks --
22 the benefits and I think it's in the overall interest of the
23 estate not to honor that prepetition obligation.

24 So non-debtor party, I'm sorry, you get the -- you
25 can file a general unsecured claim and you're going to get

1 repaid in bankruptcy dollars. That's how it works. There's
2 nothing in SIPA that changes that. SIPA says -- SIPA
3 incorporates the claim process under the Bankruptcy Code and
4 the fact that we got our securities back doesn't mean, hey,
5 you know, any other breaches that may have been committed
6 you have no recourse for.

7 THE COURT: All right.

8 MR. FARRELL: And that nothing in SIPA says that,
9 Your Honor.

10 THE COURT: All right. You indicated that the
11 point with respect to the superseding of the UCC by SIPA was
12 raised for the first time on reply. You haven't had a
13 chance to put in briefing on that.

14 MR. FARRELL: Correct.

15 THE COURT: You can do that. You also need to put
16 in amended amounts connected to each of the claims that
17 reflect what the dollars are associated with the time frames
18 that we focused on today.

19 MR. FARRELL: All right.

20 THE COURT: Not indicate -- not indicating at all
21 as to whether or not those actually are the correct dates,
22 but my view preliminarily would be even if you have a claim
23 -- which I'm highly sceptical that you do, but I'm willing
24 to read your further briefing on this narrow point -- that
25 it's cabined at those dates.

1 MR. FARRELL: Okay. Fair enough, Your Honor.

2 THE COURT: And I suspect that the numbers are
3 going to be dramatically smaller. It doesn't affect the
4 legal analysis of whether or not there's a claim at all, but
5 I think it's important to have at least there being a more
6 accurate statement of your alleged damages.

7 Now with respect to Claim Number 7001166 filed by
8 Jennifer Candell (ph), there was no response to the
9 objection.

10 MR. FARRELL: Your Honor, you had previously
11 ordered that claimant --

12 THE COURT: Okay. All right. So why don't you
13 submit those papers within 30 days. If the trustee would
14 like to have an opportunity to reply thereafter, let's say
15 14 days after that. If I feel that there's a need for
16 further argument I'll let you know, otherwise I'll just
17 issue a decision. All right.

18 MR. FARRELL: Thank you --

19 THE COURT: Thank you so much.

20 MR. FARRELL: -- very much, Your Honor.

21 THE COURT: Have a good day.

22 MR. FARRELL: You too, Your Honor.

23 THE COURT: Thank you.

24 MR. PACE: Thank you, Your Honor.

25 THE COURT: Okay. Let's go to the LBHI calendar,

1 please.

2 (Pause)

3 UNIDENTIFIED SPEAKER: Your Honor --

4 THE COURT: Yes.

5 UNIDENTIFIED SPEAKER: -- may I approach with the
6 order?

7 THE COURT: Yes. Thank you very much.

8 (Pause)

9 MS. ARTHUR: Good morning, Your Honor.

10 THE COURT: Good morning. How are you?

11 MS. ARTHUR: For the record, Candace Arthur of
12 Weil, Gotshal & Manges on behalf of Lehman Brothers Holdings
13 Inc. as plan administrator. As reflected on the agenda, the
14 plan administrator has three matters before the Court today.

15 THE COURT: Okay.

16 MS. ARTHUR: First, we're moving forward on an
17 uncontested basis with the plan administrator's motion,
18 pursuant to Bankruptcy Rule 9019 and Section 105(a) of the
19 Bankruptcy Code seeking approval of a settlement agreement
20 that relates to the Exum Ridge CBO 2007-2 credit default
21 swap agreement and indenture.

22 The motion was filed on January 20th and a copy of
23 the confidential settlement agreement was provided to the
24 Court on February 2nd.

25 THE COURT: Yes. I have it.

1 MS. ARTHUR: I would also like to note for the
2 Court that we filed the declaration of Lawrence Brahman (ph)
3 in support of the motion on February 11th, and U.S. Bank
4 National Association in its capacity as trustee under the
5 indenture filed an affidavit on February 17th in connection
6 with the motion.

7 By way of background, Your Honor, about a year ago
8 on October 18th, 2013, the plan administrator filed a motion
9 that sought, among other things, approval of a settlement
10 agreement that related to the Exum Ridge 2007-2 transaction.
11 There were objections and the plan administrator withdrew
12 the motion solely with respect to the initial Exum Ridge
13 settlement agreement without prejudice.

14 The amended -- the agreement has been subsequently
15 amended and we noticed to all parties in interest, and the
16 amended settlement agreement is before the Court today.

17 THE COURT: Okay.

18 MS. ARTHUR: The plan administrator submits that
19 the agreement is in the best interest of LBSF and its estate
20 and creditors.

21 As the Court will note, pursuant to the terms of
22 the settlement agreement on February 6th one of the Class V
23 noteholders did file a limited objection in order to opt out
24 of the settlement agreement and obtain a status of an
25 objecting noteholder.

1 The settlement agreement provides that amounts
2 will be set aside into escrow in order to cover the
3 objecting noteholders' claims.

4 THE COURT: Okay.

5 MS. ARTHUR: The limited objection is not an
6 objection to the actual motion or settlement agreement. No
7 other responses were filed in connection with the motion and
8 we are moving forward on an uncontested basis.

9 THE COURT: All right.

10 MS. ARTHUR: Accordingly, subject to any question
11 that Your Honor may have, the plan administrator
12 respectfully requests that the Court grant the motion and
13 approve the settlement agreement.

14 THE COURT: All right. You've confirmed that the
15 objection that was filed by the noteholder is, in fact, not
16 an objection to the settlement itself.

17 Let me ask if anyone else wishes to be heard with
18 respect to the trustee's motion pursuant to Rule 9019 to
19 approve the Exum Ridge settlement agreement.

20 Good morning.

21 MR. TOP: Good morning, Your Honor. Frank Top on
22 behalf of --

23 THE COURT: How are you, Mr. Top?

24 MR. TOP: -- U.S. Bank National Association. Very
25 well.

1 I obviously don't have any objection to the
2 settlement agreement.

3 THE COURT: Okay.

4 MR. TOP: I just wanted to note for the record
5 that there were actually two -- initially two limited
6 objections filed with respect to the original motion. I
7 reached out to both those people. One decided that they
8 would file a motion, the other elected not to file a motion.
9 I also physically sent them a copy of the notice --

10 THE COURT: An objection you mean.

11 MR. TOP: Yeah. Right. That's right.

12 THE COURT: You said to file a motion --

13 MR. TOP: That's right. No. I'm sorry. Yeah.

14 The other --

15 THE COURT: Okay.

16 MR. TOP: -- elected not to file an objection to
17 it. And so I just wanted to make sure that this Court knows
18 that, you know, we -- at least we've physically reached out
19 to people to make sure that they knew that this motion was
20 pending and --

21 THE COURT: Very good.

22 MR. TOP: -- and whether or not they wanted to
23 continue their --

24 THE COURT: Okay.

25 MR. TOP: -- limited objections.

1 THE COURT: Very good. Thank you.

2 MR. TOP: Thank you.

3 THE COURT: All right. That being said, the
4 settlement clearly falls above the lowest level of the range
5 of reasonableness is in -- and is in the best interest of
6 the estate and will be approved.

7 MS. ARTHUR: Thank you, Your Honor.

8 THE COURT: Okay.

9 MS. ARTHUR: I will turn the podium over now to my
10 colleague, Garrett Fail --

11 THE COURT: All right.

12 MS. ARTHUR: -- who will handle the second item.

13 THE COURT: Very good.

14 (Pause)

15 THE COURT: All right. So that brings us to the
16 Nomura matter --

17 MR. FAIL: Yes, Your Honor.

18 THE COURT: -- correct?

19 MR. FAIL: The next item on the agenda -- for the
20 record, Garrett Fail, Weil, Gotshal & Manges for Lehman
21 Brothers Holdings Inc, the plan administrator.

22 The next item on the agenda is the four hundred
23 and eighty-sixth objection --

24 THE COURT: Okay.

25 Mr. FAIL: -- specifically only with respect to

1 the two claims of Nomura Securities, Ltd. We think the --
2 the plan administrator believes the objection is a simple
3 enforcement of plan provisions. There's no dispute that
4 under the plan under the Bankruptcy Code claims are valued
5 as of the petition date. There's no dispute that the plan
6 provides that consideration provided by a primary obligor is
7 converted to U.S. dollars from a foreign currency on a
8 confirmation date basis. There's no dispute that the plan
9 determines how a guarantee claim would be satisfied, and
10 there's no dispute that Nomura's claims have been -- would
11 be satisfied in full if allowed using those calculations and
12 using Nomura's estimates.

13 Specifically, they -- Nomura is saying its
14 received approximately \$52.7 million -- U.S. dollars for a
15 \$52.1 million claim and 14.3 million for a \$14.2 million
16 claim.

17 THE COURT: Okay.

18 MR. FAIL: Unless Your Honor has any questions.

19 THE COURT: Let me talk to Mr. Neier.

20 MR. FAIL: Thank you.

21 THE COURT: How are you, Mr. Neier?

22 MR. NEIER: Good morning, Your Honor.

23 THE COURT: I'm going to pay you a left-handed
24 compliment.

25 MR. NEIER: Okay.

1 THE COURT: If this object -- if this had been
2 filed by someone other than you, I would have dismissed it
3 out of hand as being frivolous.

4 MR. NEIER: Oh, really?

5 THE COURT: Yeah. So the fact that you filed it
6 got my attention. But I'm not with you at all.

7 MR. NEIER: Well, Your Honor --

8 THE COURT: The 502(b) is -- speaks to the amount
9 of claims as of the petition date. It's not about a
10 distribution on account of the claims.

11 MR. NEIER: Well, it's sort of about
12 distributions, Your Honor. It says, and I'll just quote it,
13 or just the relevant part. It says --

14 THE COURT: Okay.

15 MR. NEIER: -- "after a notice and a hearing shall
16 determine the amount of such claim in lawful currency of the
17 United States as of the date of the filing of the petition
18 and shall allow such claim in such amount."

19 THE COURT: Sure. So it's an allowed claim. I
20 mean, we go to your charts. It's an allowed claim as of the
21 petition date in U.S. dollars.

22 MR. NEIER: Right. I just want to correct Mr.
23 Fail in that that particular chart was -- what I said was
24 Lehman's characterization of a claim would result in the
25 following calculation. It's not that there was no dispute.

1 It's that I was taking Lehman's math and using that here.

2 THE COURT: Right. But do we agree that value as
3 of the petition date in U.S. dollars based on the exchange
4 rate then in effect, Claim Number 14150 is 52,156,907.

5 There's no dispute about that, right?

6 MR. NEIER: Correct, Your Honor.

7 THE COURT: Okay. And, similarly, with respect to
8 --

9 MR. NEIER: I don't think there's any math
10 dispute.

11 THE COURT: Okay. So there's no math dispute. So
12 those -- so, then, the next question is if you take the
13 recovery, if you take the recovery amount, right, as of the
14 confirmation date as the plan says and you do the math,
15 right, you get 100 percent recovery on these claims.

16 MR. NEIER: But we didn't get 100 percent
17 recovery. It's not a satisfied claim. We got 74 percent
18 recovery.

19 THE COURT: Well, but that's only because you are
20 taking the actual -- you got actual currency, right?

21 MR. NEIER: We got --

22 THE COURT: You got Yens.

23 MR. NEIER: -- Yen.

24 THE COURT: Right.

25 MR. NEIER: And in Yen we got --

1 THE COURT: In Yen --

2 MR. NEIER: -- a 74 percent recovery.

3 THE COURT: Right. You got a 74 percent recovery
4 when you value the Yen in U.S. dollars as of the petition
5 date. And --

6 MR. NEIER: But from our perspective, Your Honor,
7 you can't do an end run around 502(b) by saying we're going
8 to value the distribution in a -- using a different date.
9 That --

10 THE COURT: Well --

11 MR. NEIER: -- means the entire Bankruptcy Code --

12 THE COURT: But how -- how about --

13 MR. NEIER: -- is based on valuing things --

14 THE COURT: Sure.

15 MR. NEIER: -- as of the petition date.

16 THE COURT: Right. But you have to -- you value
17 -- but you don't value --

18 MR. NEIER: And this -- and by the way this --

19 THE COURT: But --

20 MR. NEIER: -- could only be used -- I'm sorry,
21 Your Honor.

22 THE COURT: Yeah. But you --

23 MR. NEIER: Go ahead.

24 THE COURT: -- don't value, for example, other
25 forms of plan currency as of the petition date. You value

1 it as of some other date. You --

2 MR. NEIER: Your --

3 THE COURT: Right?

4 MR. NEIER: So, Your Honor, this could only be
5 used to discriminate against current claims against foreign
6 currency because, obviously, if the exchange rates were
7 different they could have gone to the market and paid it off
8 in Yen, okay, if it was to their advantage. So this was
9 only been done to discriminate against people who have
10 claims in -- denominated in foreign currency --

11 THE COURT: Well, it's not --

12 MR. NEIER: - and treating them differently than
13 --

14 THE COURT: But --

15 MR. NEIER: -- those creditors who have claims in
16 U.S. currency.

17 THE COURT: But if there's a discrimination, then
18 it's a discrimination that's -- that is not addressed in the
19 Bankruptcy Code. The Bankruptcy Code provision only talks
20 about fixing the claims based on the exchange rates then in
21 effect on the petition date. And everything else is a
22 negotiation, just like --

23 MR. NEIER: So -

24 THE COURT: -- it's a negotiation with any other
25 creditor.

1 MR. NEIER: So --

2 THE COURT: If the exchange rate had gone the
3 other way, right, and you looked at it on the distribution
4 date, you could have a windfall. Somebody --

5 MR. NEIER: So --

6 THE COURT: Somebody has a --

7 MR. NEIER: So the legislative history of the
8 section was designed -- of 502(b) was designed to prevent
9 gamesmanship by both sides. It was to prevent gamesmanship
10 by a debtor and it was also, probably more important, for
11 congress at the time to prevent gamesmanship by creditors so
12 that they couldn't trade the claims. Everybody knows what
13 the claims should be. They should be valued as of the --

14 THE COURT: Right.

15 MR. NEIER: -- petition date.

16 THE COURT: Right.

17 MR. NEIER: And I don't think you can do an end
18 run about -- around that by saying, oh, no, we're going to
19 value distributions. I mean, they could have put in this
20 plan, which, of course, a foreign creditor with a primary
21 claim against a foreign non-debtor can't vote on, can't
22 object to, and the court doesn't have subject matter
23 jurisdiction to determine. Okay.

24 So they're -- they have no standing whatsoever to
25 object to the plan. They're not even a party to the case

1 because Lehman Brothers Japan is a separate foreign non-
2 controlled debtor.

3 THE COURT: You could have --

4 MR. NEIER: Non-debtor, excuse me.

5 THE COURT: Okay. But we're here on a guaranteed
6 claim against LBHI.

7 MR. NEIER: Right. And for the purposes of the
8 guarantee claim they could have written that a single
9 sheckle will be determined to be a hundred million dollars
10 for the purposes of calculating the guarantee claim and that
11 would be illegal and an end run around the Bankruptcy Code
12 and an end run around 502(b).

13 It's very smart. It's marvellous clever thinking
14 and it was put into the amended plan. There's a fascinating
15 footnote in the reply that says, this was part of
16 negotiations as part of an amended plan.

17 THE COURT: Well, sure, because you had to -- I
18 mean, think about the practical functioning of the
19 administration of a plan like this because if you think
20 about what the alternatives are, three come to mind: One,
21 that you use the confirmation -- the petition date exchange
22 rate. But that has no bearing on actual value just as the
23 value of other plan consideration is not valued as of the
24 confirmation date. It's valued as of some other date in the
25 future, right? So that was one choice.

1 The second choice was confirmation. Why is that a
2 good choice? Well, that's a good choice because the plan
3 administrator can't be frozen. It has to have the ability
4 to plan and establish reserves, right, and make
5 distributions, as opposed to the alternative which is on the
6 distribution date. Well, how would that work? Right.

7 So, I mean, I wasn't there, but just generally
8 being a little familiar with the way these things work --

9 MR. NEIER: You could --

10 THE COURT: -- right?

11 MR. NEIER: -- game the system in all sorts of
12 manners of ways and the Bankruptcy Code does not permit it.
13 It --

14 THE COURT: But you say --

15 MR. NEIER: -- says that there's a --

16 THE COURT: -- you say that, but --

17 MR. NEIER: -- hard line --

18 THE COURT: You say that, but 502(b) or some other
19 provision could have been drafted to say, and the value of
20 all distributions received on account of a claim valued as
21 of the petition date as the currency exchange rate then in
22 effect is similarly valued at that date. It doesn't say
23 that.

24 MR. NEIER: And very smart bankruptcy lawyers can
25 always find an end run around provisions in the Bankruptcy

1 Code. They've been doing it since time in memorial and,
2 frankly, that's why we all have jobs, okay, because if the
3 Bankruptcy Code had all those specific little things to
4 prevent gotchas, we would be out of business. So I think
5 that this is a clever way of an end run around 502(b) and it
6 should not be permitted.

7 THE COURT: Well, I think I very much respect that
8 you're making this argument. That gives me pause. But I
9 absolutely disagree and I think that to the extent that you
10 believe that you're correct, you need to take it up with
11 congress or perhaps the Second Circuit because I -- I went
12 through all the scenarios in my mind of the different ways
13 that people could game the system. I looked at the
14 confirmation order. But, fundamentally, I have to apply the
15 Bankruptcy Code.

16 I don't believe that the plan provision proved by
17 Judge Peck violates the Bankruptcy Code in any way. I think
18 that Lehman's math is correct and rarely do I read a
19 pleading where I agree with everything that's said. The
20 reply that's been filed here is such a pleading. And I
21 don't think your point, which is a nice point about whether
22 or not Nomura could have objected so to speak in the case
23 really makes a difference because you're here on a guarantee
24 claim against LBHI and presumably you had that claim at the
25 time, albeit in a contingent and/or unliquidated form.

1 MR. NEIER: What would be -- what would stop a
2 debtor in the future from saying in its plan, you know, we
3 have claims in foreign currency against non-debtor
4 affiliates, foreign non-debtor affiliates. For the purposes
5 of calculating our guarantee claim we're going to say each
6 one of those claims is valued at \$100 million and,
7 therefore, your starting point is \$100 million in the hole
8 --

9 THE COURT: Well --

10 MR. NEIER: -- with respect to your guarantee
11 claim.

12 THE COURT: -- that -- that hypothetical --

13 MR. NEIER: I don't think you can do that.

14 THE COURT: That hypothetical is not before me.
15 Clever lawyers can think of any number of things to do.

16 MR. NEIER: They did here.

17 THE COURT: And it was approved. I don't think
18 it's in violation of the Bankruptcy Code. I don't know if
19 there were any objections to it at the time that were
20 specifically or generally overruled by --

21 MR. NEIER: I don't think so, Your Honor.

22 THE COURT: -- Judge Peck.

23 MR. NEIER: The -- you know, as I said, there's
24 this footnote in the reply that says that it was amended as
25 a result of negotiations, but there's no pleading or

1 objection that addresses it. It's not mentioned in the
2 disclosure statement --

3 THE COURT: I have --

4 MR. NEIER: -- other than a recitation of the
5 plan.

6 THE COURT: You know as well as I do that I have
7 no ability to, you know, peel that onion back and I'm
8 certainly not going to entertain a collateral attack on the
9 confirmation.

10 MR. NEIER: Yeah. And I don't -- respectfully I
11 don't think I am collaterally attacking the plan. I think
12 I'm relying on the plan to say that the last sentence, which
13 is omitted from the initial objection which says, "Nothing
14 contained in this provision shall affect the applicable
15 exchange rate for determining the allowed amount of any
16 claim," and claim includes foreign claims. It includes --

17 THE COURT: And I believe --

18 MR. NEIER: -- foreign primary claims.

19 THE COURT: -- that that's been -- that that's
20 wholly complied with by the plan and it does not dictate
21 that the distribution be allowed at the exchange rate then
22 in effect on the petition date

23 MR. NEIER: But just --

24 THE COURT: Mr. Neier --

25 MR. NEIER: -- honestly -- I got it, Your Honor.

1 THE COURT: Okay.

2 MR. NEIER: But, honestly, I don't understand how
3 74 percent equals 100 percent. It doesn't make any sense to
4 me.

5 THE COURT: Okay. All right. I'm going to ask
6 the trustee to submit an order on this one and I'll see you
7 next time. All right.

8 MR. NEIER: Thank you, Your Honor.

9 THE COURT: Thank you very much.

10 MR. PACE: Thank you very much, Your Honor. My
11 colleague, Maurice Horwitz, will be handling --

12 THE COURT: I'm sorry. I said the trustee. I
13 meant LBHI.

14 MR. PACE: Understood. Thank you, Your Honor.

15 Maurice Horwitz will be handling the next matter
16 on the agenda.

17 THE COURT: Okay.

18 And this is our last matter for today, correct?
19 This is the --

20 MR. HORWITZ: This is the --

21 MR. JOHNSON: This is the motion of Dr. Marsoner,
22 correct?

23 MR. HORWITZ: Correct. And I'll turn the podium
24 over to Dr. Marsoner's counsel. It's his motion.

25 THE COURT: Thank you.

1 (Pause)

2 MR. DONOHO: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. DONOHO: Christopher Donoho of Hogan &
5 Lovells.

6 THE COURT: How are you?

7 MR. DONOHO: I'm well, thank you. How are you?

8 THE COURT: I'm okay.

9 MR. DONOHO: We have -- here in the courtroom Dr.
10 Marsoner has come in from Austria.

11 THE COURT: Okay. Welcome, sir.

12 MR. DONOHO: I also have with me Shane Johnson --

13 THE COURT: Okay.

14 MR. DONOHO: -- a colleague of mine from Hogan &
15 Lovells --

16 THE COURT: Okay.

17 MR. DONOHO: -- who will --

18 THE COURT: Who looks vaguely familiar.

19 MR. DONOHO: Yes. He was Judge Cropper's (ph)
20 clerk so you probably saw him in the hallway. He's going to
21 be proceeding here. He'll be running through a short
22 proffer and then a discussion of the law if that --

23 THE COURT: Okay.

24 MR. DONOHO: -- suits the Court.

25 THE COURT: Okay. I don't think I'm having a

1 proffer. It's a motion so there's no -- it's not an
2 evidentiary hearing. There's no proffer. This is just a
3 straight up legal question of whether or not I'm -- I can
4 deem the proof of claim to be timely filed.

5 MR. DONOHO: Okay.

6 THE COURT: Okay.

7 MR. DONOHO: Well, I think we'll -- then we'll
8 rely on the declarations and the statements and Mr. Johnson
9 will get right to it.

10 THE COURT: That sounds better.

11 MR. DONOHO: Thank you, Your Honor.

12 MR. JOHNSON: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. JOHNSON: My name is Shane Johnson, attorney
15 for Dr. Marsoner.

16 So Dr. Marsoner's claim is based on the well
17 established principal that under the due process clause if a
18 known creditor does not receive actual notice of the bar
19 date, then his claim cannot be constitutionally discharged.

20 THE COURT: Okay. So let's stop there. So at
21 what point is it -- would it be too late for Dr. Marsoner to
22 say, hey, I didn't have specific notice of the bankruptcy,
23 but I want to be able to file a claim?

24 MR. JOHNSON: Well, the statute of limitations
25 would still bar a claim that was, you know, outside whatever

1 the applicable statute of limitations was. So, you know,
2 that would still prevent a claim from being filed if you
3 were outside of whatever the applicable time period is.

4 Here, it's six years. A contract claim or quantum
5 meruit claim and it didn't accrue --

6 THE COURT: So --

7 MR. JOHNSON: I'm sorry.

8 THE COURT: Go ahead. When did it --

9 MR. JOHNSON: It didn't accrue until October 2012
10 which was when LCPI first earned revenues from the F1
11 transaction because they received a dividend recap in
12 October of 2012. That was the first time they received
13 revenues from that and Dr. Marsoner's services were provided
14 for ten percent of the F1 transaction revenues.

15 So October 2012 to now is certainly under the six
16 years.

17 So based on that standard, Your Honor, Dr.
18 Marsoner has to prove that he was a known creditor and he
19 did not receive actual notice of the bar date. So -- and
20 the amount of time that has lapsed since the bar date is not
21 part of that test. So Dr. Marsoner was a known creditor
22 because he was reasonably ascertainable by LBHI and LCPI.

23 Now the debtors assert that Dr. Marsoner had no
24 contact with LBHI or LCPI. That's simply untrue. Vintorio
25 Piniati (ph), was at the time of the F1 reinvestment the

1 former vice-chairmen and European M&A for LBHI. He also was
2 signed with 2002 and 2004 elbow agreements that Mr. Marsoner
3 entered into. He --

4 THE COURT: You know, I -- before you get rolling
5 --

6 MR. JOHNSON: Okay.

7 THE COURT: Okay. Just in the short time,
8 relatively short time that I've presided over these cases
9 there have been dozens, if not hundreds of pro se folks who
10 managed to file timely claims. And you're asking me to
11 conclude that Dr. Marsoner, who by his own account, was
12 involved in these sophisticated transactions somehow should
13 be granted an exception to the general rule that requires
14 you to act expeditiously and file a claim. It doesn't -- it
15 doesn't fly. It doesn't fly.

16 MR. JOHNSON: Well, Your Honor, he didn't know
17 that he had a claim against --

18 THE COURT: That's not the way it works, though.
19 He -- any number of folks came in and filed claims, called
20 up Epiq, you know, filed claims, wrong, right, awkward,
21 inartful, however, attempting to preserve their rights. And
22 Dr. Marsoner didn't do any of that. He certainly had the
23 wherewithal -- to say that he couldn't figure out how the
24 U.S. Bankruptcy Code worked, there was probably the most
25 public court proceeding in the history of the world and the

1 notion that he wasn't given a specific notice and,
2 therefore, could not know that he should have filed a claim,
3 it's very hard to credit.

4 MR. JOHNSON: But, Your Honor, the test isn't
5 whether he knew that there was a Chapter 11 proceeding. I
6 mean, case law is clear that simple knowledge that there was
7 Chapter 11 proceeding is not sufficient. The standard is
8 you're a known creditor, which Dr. Marsoner is, then you
9 have to provide them actual notice of the bar date or under
10 the due process clause you cannot discharge his claim.

11 So he was a known creditor because of he knew --
12 Vintorio Piniati is who he coordinated his F1 advice for.
13 He was a senior member of LBHI's management. And he has
14 stated to the Court in a sworn letter that it was his
15 understanding that Lehman was going to pay Dr. Marsoner for
16 his advice or he wouldn't have asked him for it. The
17 agreements with LBEL also provided that Dr. Marsoner would
18 provide his advice to the Lehman group, not just LBEL.

19 And so -- and with respect to LCPI, they actually
20 benefited from his advice because they invested in the F1
21 transaction and they have received a benefit, a huge benefit
22 for his advice. So Dr. Marsoner was a known creditor. So
23 then if --

24 THE COURT: A known creditor of LBHI?

25 MR. JOHNSON: Of LBHI and LCPI. He was a known

1 creditor of LBHI because he coordinated his F1 transaction
2 advice with Vintorio Piniati who was a -- at the time was a
3 vice chairman and head of European M&A for LBHI.

4 So the -- LBHI had knowledge that he was a
5 creditor. Vintorio Piniati has stated in his sworn letter
6 that he would not have undertaken Dr. Marsoner's services if
7 he did not believe that he was going to be paid for them.

8 LCPI has knowledge because they ultimately
9 benefited hugely from his advice. So to say that they don't
10 know who Dr. Marsoner is. They don't have any knowledge of
11 these agreements, even though the agreements stated that
12 they would be provided to the entire Lehman group and the
13 contact person was a senior member of LBHI. The debtors
14 cannot say that they didn't know who Dr. Marsoner was. They
15 didn't know anything about these agreements. So he was a
16 known -- based on that he was a known creditor to them.

17 And so as a known creditor he was entitled to
18 actual notice of the claims bar date, but he never received
19 it.

20 Now -- and as I stated, actual knowledge of simply
21 the Chapter 11 proceeding is not sufficient. Case law is
22 clear on that. So --

23 THE COURT: But the problem that you have also is
24 that the bar date notices went out in 2009 --

25 MR. JOHNSON: That's correct.

1 THE COURT: -- right? And the revenues weren't
2 earned until the fall of 2012 --

3 MR. JOHNSON: That's correct.

4 THE COURT: -- right? So he knows about the
5 bankruptcy. You've got the bar date notice published.

6 MR. JOHNSON: That he didn't receive.

7 THE COURT: Published.

8 MR. JOHNSON: But he's a -- he's a known creditor.
9 He's entitled --

10 THE COURT: He's a -- he's not a known creditor to
11 LBHI.

12 MR. JOHNSON: But, Your Honor, he is. He
13 coordinated his F1 transaction advice with the senior member
14 of LBHI. The knowledge of Vintorio Piniati is imputed to
15 LBHI. They -- so through that they knew that he was a
16 creditor, so publication notice is not sufficient. They had
17 to send him actual notice.

18 THE COURT: But he didn't become a creditor, if at
19 all, until 2012. So as of the time that the bar notice went
20 out, he wasn't a known creditor.

21 MR. JOHNSON: He was a known potential creditor,
22 Your Honor, because he had a success fee. Basically that
23 was the agreement that he had. He would earn ten percent of
24 the revenues as a success fee. SO whenever those revenues
25 materialized --

1 THE COURT: But that wasn't known to LBHI.

2 MR. JOHNSON: But it was, Your Honor. Vintorio
3 Piniati knew that. He was the person who signed the
4 agreement. He --

5 THE COURT: Okay. So let me -- so now -- so let's
6 do it the way you're suggesting. Bar date notice, no good
7 because he was a known creditor who didn't get notice.
8 Publication notice, no good because he was a known creditor.
9 2012, right, he -- revenues are generated. At some point,
10 right, he doesn't get paid, right? What's the point at
11 which he realizes that he is a -- he should assert a claim
12 against LBHI?

13 MR. JOHNSON: Your Honor, he first asserted a
14 claim against LBEL in their UK proceeding.

15 THE COURT: Right. And at that point he might
16 have said, uh-huh, I better assert a claim against LBHI, but
17 he didn't.

18 MR. JOHNSON: He didn't, Your Honor, because he
19 didn't know that the investment had been made by LCPI, the
20 U.S. subsidiary. He didn't know who had made -- what Lehman
21 entity had ultimately made the investment for the F1
22 transaction.

23 THE COURT: So what? I --

24 MR. JOHNSON: Well, Your Honor, how could -- if it
25 hadn't been -- if it had been a European entity, he wouldn't

1 have filed a U.S. claim. If it had been for --

2 THE COURT: You started off by telling me that
3 he's a known creditor of LBHI; that, look, here's this
4 person who he worked for who was part of LBHI, right, and
5 then we hold that thought and then you say, but he never
6 realized that he would -- might have a claim against LBHI
7 until just now. Those two are irreconcilable.

8 If he thought and knew that he was dealing with
9 LBHI and that therefore, LBHI should have known about him,
10 then at that point in time he had the wherewithal and the
11 ability to file a claim against LBHI. He didn't do that.

12 MR. JOHNSON: Your Honor, Vintorio Piniati had --
13 he had dual roles.

14 THE COURT: Right. And one of the duo was that
15 you're saying it was LBHI.

16 MR. JOHNSON: Yes.

17 THE COURT: So that put Dr. Marsoner on notice
18 that if his view now is that, oh, I was really working for
19 LBHI all along, then he was -- did he just find out that
20 Vintorio Piniati was working for LBHI?

21 MR. JOHNSON: No, Your Honor. He didn't just find
22 out that Vintorio Piniati -- he was working for LBEL because
23 Vintorio Piniati was assigned his agreements that were with
24 LBEL.

25 And so, yes, Vintorio Piniati has dual roles which

1 is why LBHI knew he was a creditor, a potential creditor,
2 but Dr. Marsoner didn't know he was a potential creditor of
3 LBHI until the UK proceeding when the administrators for
4 LBEL informed him that the F1 transaction had been invested
5 by -- the investor had been LCPI, a U.S. subsidiary, which
6 was one of the reasons that they provided him a relatively
7 small settlement amount in that case because they said the
8 benefit of your advice really went to the U.S. entities.
9 And at that point -- this is mid-2014. So at that point he
10 begins to analyze his position under U.S. law, hires
11 counsel, and then we file this motion, Your Honor.

12 (Pause)

13 MR. JOHNSON: Your Honor, because the test isn't
14 -- the test is whether the debtors knew he was a potential
15 creditor.

16 THE COURT: But the test also has to do with
17 whether or not the claimant acted -- whether they're -- I
18 mean, this is, in effect, you're asserting excusable
19 neglect.

20 MR. JOHNSON: We're not. We haven't asserted
21 excusable neglect anywhere in our papers, Your Honor.

22 THE COURT: That's because you know you couldn't
23 satisfy the standard.

24 MR. JOHNSON: No. That's because under the due
25 process clause a separate -- is totally separate from the

1 excusable neglect standard. Under the due process clause if
2 there's a known creditor you have to provide him actual
3 notice of the bar date or otherwise you cannot discharge his
4 claim.

5 So that's what we're relying on. I suppose Your
6 Honor could say, well, he doesn't -- I'm not going to
7 discharge his claim and you can go pursue it somewhere else.
8 I doubt the debtors would want that, though, and we're
9 wanting to assert his claims through the bankruptcy process.
10 But case law is clear, Your Honor. Under the due process
11 clause if you're a known creditor you have to --

12 THE COURT: But if you -- let's go back to the
13 fact that he wasn't a known creditor. You're saying he was
14 a known creditor because this individual that he worked with
15 had some connection to LBHI.

16 MR. JOHNSON: Well, it's not some connection.
17 He's a senior member of LBHI's management at the time of the
18 F1 transaction or the F1 transaction advice. So it's more
19 than some connection.

20 THE COURT: You've submitted a number of letters
21 that you -- that seem to suggest -- that you want me to view
22 as lending support to the claim.

23 MR. JOHNSON: Support for the motion and if we --
24 if the proofs of claim are deemed timely filed they would
25 ultimately serve as support for his claims as well. Yes,

1 Your Honor. And that -- in fact, the first letter is a
2 letter from Vintorio Piniati in which he states that Dr.
3 Marsoner provided valuable services on the F1 transaction;
4 that he wouldn't have asked for his advice -- and he's the
5 coordinating person under his agreements, under Dr.
6 Marsoner's agreements with LBEL.

7 And he's stating -- it's a sworn letter to the
8 Court. He's stating that he would not have asked for Dr.
9 Marsoner's advice unless he expected Lehman to pay him and
10 that that -- they -- the usual practice was for him to
11 receive ten percent of the ultimate revenues stemming from
12 his advice.

13 There are other -- there are two other letters
14 from people who served as --also had --

15 THE COURT: The letter from Mr. Bernard is
16 incomprehensible.

17 MR. JOHNSON: Okay.

18 THE COURT: Okay. It lends no support to
19 anything.

20 MR. JOHNSON: Okay. The other two letters clearly
21 support that Dr. Marsoner was a known creditor and that it
22 was their belief, and they were the people coordinating the
23 F1 transaction, that he should be paid for his advice.

24 THE COURT: Okay. Let me hear from counsel for
25 LBHI.

1 So tell me why he wasn't a known creditor.

2 MR. HORWITZ: Good morning, Your Honor. Maurice
3 Horwitz --

4 THE COURT: Good morning.

5 MR. HORWITZ: -- from Weil, Gotshal on behalf of
6 LBHI.

7 I can -- I'll answer that question first.

8 THE COURT: Okay.

9 MR. HORWITZ: The -- we've talked a lot about the
10 case law and what makes somebody a known creditor versus an
11 unknown creditor. So I just -- I'll reiterate the standard.

12 THE COURT: Sure.

13 MR. HORWITZ: A known creditor is someone who is
14 reasonably ascertainable by the debtor. Their cases talk
15 about reasonably ascertainable by a search of -- a
16 reasonable search of the debtors' books and records.

17 An unknown creditor is someone who is -- a
18 creditor that is either conjectural or future and although
19 they could be discovered upon investigation, not in the due
20 course of business would come to the knowledge of the
21 debtor.

22 THE COURT: Okay.

23 MR. HORWITZ: The debtors essentially did a
24 reasonable search of their books and records at the time
25 that they were serving the bar date notice, which at that

1 time they were already separate estates from LBEL. They
2 didn't have access to the contracts that Dr. Marsoner may
3 have entered into with LBEL. They couldn't have even gotten
4 them if they tried.

5 THE COURT: The contract -- so the contract is --
6 there's no doubt that the contract is between Dr. Marsoner
7 and LBEL, right?

8 MR. HORWITZ: The ones that are attached to the
9 motion.

10 THE COURT: Right.

11 MR. HORWITZ: Yes.

12 THE COURT: Okay.

13 MR. HORWITZ: So Dr. Marsoner relies a lot on his
14 contacts and extensive business communications with three
15 individuals who were associated with LBEL. We did a search
16 in the human resources records and couldn't find any record
17 of Vintorio Piniati or the other two individuals having had
18 a role at LBHI. The motion says that Vintorio Piniati was
19 the vice-chairman of LBEL. In the reply he's now a vice
20 chairman of LBHI.

21 HR records show that he was -- that he held the
22 title of vice chairman of LBI, never a role at LBHI, none of
23 the three individuals did. In any event, they all had left
24 by the time that the debtors were serving the bar date
25 notice. Vintorio Piniati says in his letter he left by

1 2006. So their knowledge of whatever conversations or
2 emails they had had with Dr. Marsoner were not at least --
3 the debtors didn't have the benefit of that knowledge when
4 they were putting together their list of more than 250,000
5 addresses that were serving the bar date notice on.

6 The -- but that's a factual matter that I kind of
7 want to put aside because even if they had been in the --
8 employees of LBHI at the time, it doesn't -- the record
9 doesn't show that those business interactions would have
10 made him a known creditor.

11 And I think a good case to look to for support of
12 that is X -- In re: XO Communications. That -- there are a
13 lot of cases that we cite and that Dr. Marsoner cites where
14 creditors are trying to get the status of known creditor
15 because they have some kind of a litigation claim. And if
16 the litigation is already pending, the Court might say that
17 that was a known creditor, but when it was a contingent
18 litigation, something that's -- an action that somebody
19 might bring in the future, that doesn't rise to the level of
20 being a known creditor.

21 And XO is a good example because there the movant
22 was a vendor of the debtor who, itself, was in Chapter 11
23 and wanted to file a claim based on a preference. And the
24 record established that there was a long-standing business
25 relationship between the debtor and this vendor. The debtor

1 admitted that. The debtor actually even listed this vendor
2 in its list of creditors, served the bar date notice on an
3 old address, a lease that had already been rejected by the
4 debtor.

5 But the Court said it didn't matter that there
6 were these extensive business communications in the past
7 because the type of claim that the vendor was trying to
8 assert was a preference claim. It was a litigation claim.
9 It was a creature of the Bankruptcy Code. It's not the kind
10 of claim that a company tracks in its books and records.

11 And that's the kind of claim that Dr. Marsoner is
12 trying to assert here. He's trying to assert a claim based
13 on quantum meruit or a contract claim, but not based on a
14 contract between these debtors and himself. It's not the
15 type of claim that any of these debtors tracked in their
16 books and records. And so it wouldn't have been -- it would
17 never have appeared no matter how long they searched through
18 their records. They would have never seen his name come up
19 as a known creditor.

20 And even if these three individuals still worked
21 at LBHI they wouldn't have known that he was thinking he was
22 going to assert a quantum meruit claim against LBHI much
23 less LPCI.

24 For that reason he's not a known creditor. The
25 notice that he got through publication and just through

1 generally knowing that these cases existed, which he admits
2 he knows because he sent an email to somebody saying he was
3 no longer going to perform under his contract with LBCC
4 because of the bankruptcy. He knew about the Chapter 11
5 cases. He knew -- he had the ability to look on the docket,
6 to check the schedules, to see if we had his right --
7 correct address even to follow what else -- what happened
8 with that F1 investment that he worked so hard for, which
9 he's now seeking ten percent of \$1.5 billion or whatever
10 it's for.

11 He didn't do any of those things. And he was
12 trying to --

13 THE COURT: So how this is beginning to sound
14 very, what I would say, facty (sic). It -- is this -- does
15 this involve disputed facts as to which an order to rule in
16 LBHI's favour, if I were inclined to do so, I would need a
17 factual record. In other words, to support your statement
18 of the law that his status as a known creditor was not
19 reasonably ascertainable?

20 MR. HORWITZ: I don't think it's -- I think the
21 facts that you would need -- to find that he was a known
22 creditor, the facts are not there. So I don't think -- I'm
23 not going to be able to provide them and I don't think Dr.
24 Marsoner is going to be able to provide them. So it's facty
25 (sic) in the sense that those facts have not been alleged.

1 They're not in the record that he had any kind of a factual
2 relationship with these debtors that rise to the level of
3 making him a known creditor.

4 And because of that notice was adequate. So those
5 -- whatever factual showing would have to be made, it's --
6 Dr. Marsoner has had his chance to make it and he hasn't
7 been able to show it.

8 THE COURT: Okay. Thank you.

9 So do I have to go to an evidentiary hearing?

10 MR. JOHNSON: Your Honor, I think there are
11 serious factual disputes. I mean, they're disputing that
12 Vintorio Piniati, you know, served in a senior role to LBHI.

13 THE COURT: Okay. But there's more to it than
14 that. He's also saying that by -- Mr. Piniati himself said
15 that he left as of 2006. So --

16 MR. JOHNSON: The transaction occurred -- the
17 transaction advice occurred before then, Your Honor.

18 THE COURT: Right. But your due process argument
19 hinges on the motion of a known creditor --

20 MR. JOHNSON: Sure.

21 THE COURT: -- and then you have to look around to
22 see who or what was reasonably ascertainable. Somewhat
23 similar maybe to the issues that Judge Gerber's been
24 struggling with this week, but different.

25 But I -- I'm -- if you were to clear the hurdle of

1 this hearing, and then we were to go to some sort of an
2 evidentiary proceeding, certainly the papers that you've
3 submitted now would not enable me to rule as a matter of law
4 and fact that Dr. Marsoner was a known creditor. That
5 wouldn't do it.

6 MR. JOHNSON: Well, Your Honor, we've presented a
7 sworn letter from Vintorio Piniati saying his role in LBHI
8 --

9 THE COURT: But he left -- he says he was done as
10 of 2006 so that's obviously before even the commencement of
11 the bankruptcy proceeding. So at the moment in time where
12 the debtor was obligated to do the reasonable ascertaining
13 of who its known creditors were, he wasn't around. So you
14 can't impute his familiarity with Dr. Marsoner to LBHI as of
15 that point.

16 MR. JOHNSON: Well, they knew as of 2006 when he
17 left. They don't suddenly forget everything that's ever
18 happened to them. They don't forget that Dr. Marsoner has
19 these agreements. There was a subsequent agreement in 2007
20 that was his Austrian address that they didn't provide
21 notice to.

22 THE COURT: But you're talking -- now you're
23 talking about they and that conflates LBEL and LBHI.

24 MR. JOHNSON: No. I mean, LBHI. If I said they I
25 meant LBHI. Sorry, Your Honor. LBHI can't forget what

1 they've -- what they knew through Vintorio Piniati.

2 THE COURT: But they -- as a matter of law you
3 cannot impute the knowledge of every -- even every senior
4 employee of LBHI who may have left LBHI's employ, and then
5 at the time of the crafting of the known creditor list it's
6 not reasonable to say that LBHI at that point or counsel to
7 LBHI should have queried every single person, senior
8 executive, who may have left LBHI's employ in the five years
9 prior to that because under your construction the only thing
10 that applies is the statute of limitations.

11 So you would have had -- so what you're saying is
12 that for a bar date notice that issued in 2009, because
13 there might be creditors who could assert claims for six
14 years, you would have to go back five-plus years and figure
15 out every single person who ever had contact. That can't be
16 -- it can't be right.

17 MR. JOHNSON: No. We're not asking -- we're not
18 stating that they should have done that. They should have
19 -- they also should have done a reasonable check of their
20 books and records which would have shown that they had paid
21 Dr. Marsoner on numerous -- LBHI -- excuse me. LBHI had
22 paid Dr. Marsoner on numerous occasions. They paid him
23 contingent and fixed fees for services that he had
24 previously provided.

25 LBHI knew about --

1 THE COURT: On the Formula 1 deal?

2 MR. JOHNSON: No, Your Honor. They didn't pay him
3 on the Formula 1 deal.

4 THE COURT: Okay. But that doesn't -- the fact
5 that he was paid other amounts by LBHI, there's no nexus
6 between that and the Formula 1 deal.

7 MR. JOHNSON: Well, the fact that LCPI ultimately
8 benefited, the U.S. subsidiary.

9 THE COURT: But, again, the point that counsel
10 made, you're not handing me a contract, the counterparties
11 to which are, on the one hand, LBHI and Dr. Marsoner.
12 You're making a quantum meruit claim. You're making a
13 quantum meruit claim on behalf of an individual who was not
14 on LBHI's radar screen via the individuals that you
15 identify.

16 MR. JOHNSON: To say that it wasn't on LBHI's
17 radar screen is completely inaccurate, Your Honor. I mean,
18 they -- the agreement stated that he would provide services
19 to the entire Lehman group and then the contact person is a
20 senior member of LBHI. So to say we don't have any clue
21 about these agreements, we never saw them, we don't know --

22 THE COURT: All right. Well, only because I feel
23 a level of discomfort about the need for there to be a
24 factual record I'll -- I'm going to give you a trial date.
25 We're just going to go to trial.

1 MR. JOHNSON: Okay.

2 THE COURT: If you think you need discovery, serve
3 a discovery request. But I do not believe based on what
4 you've put before me at this point that I can come to the
5 conclusion that Dr. Marsoner was a known creditor. That
6 being said, though, this feels sufficiently facty (sic) that
7 I'm willing to entertain having an evidentiary hearing on
8 it, or if the parties agree we can do it based on further
9 papers.

10 MR. JOHNSON: Your Honor, if I could say one thing
11 about the -- one thing about the XO communications case.

12 THE COURT: Sure.

13 MR. JOHNSON: That case, I'm not sure why the
14 debtors focused so much on the known creditor analysis. The
15 creditor there admitted that they weren't a known creditor.
16 So I'm not sure why the debtors focus so much on that.

17 THE COURT: I'll take another look at it.

18 MR. JOHNSON: Sure.

19 THE COURT: But, again, I think the reasonably
20 ascertainable test is the right one.

21 MR. JOHNSON: It is.

22 THE COURT: And I think that based on what I have
23 before me I would not be able to conclude that Dr. Marsoner
24 was reasonably ascertainable and, therefore, is a known
25 creditor of LBHI and it's underscored by the nature of the

1 claim that's being asserted. There is no agreement that
2 says, LBHI and also you're going to have to deal more
3 comprehensibly with the separation between LBEL and LBHI.

4 So let me hear from counsel for LBHI who
5 undoubtedly is not going to be super excited with the
6 Court's determination.

7 MR. HORWITZ: I just want to clarify -- Maurice
8 Horwitz on behalf of LBHI -- if we're talking about a trial
9 or evidentiary hearing, is this going to be limited to the
10 due process question or -- and not at all on the merits of
11 the underlying claim?

12 THE COURT: Correct.

13 MR. HORWITZ: Yes.

14 THE COURT: Yes. Correct.

15 MR. HORWITZ: Okay.

16 THE COURT: Just -- we're just at the threshold of
17 the door and that is whether or not I can deem this to be a
18 timely filed proof of claim and that turns on, I think, both
19 sides agree as to whether or not Dr. Marsoner was a known
20 creditor.

21 MR. HORWITZ: Okay. Thank you, Your Honor.

22 THE COURT: All right. So can I leave it to you
23 to work with each other to come up with a reasonable
24 schedule?

25 MR. HORWITZ: Yes.

1 THE COURT: And reach out to Ms. Lutkis (ph) and
2 let us know and we'll get you on the calendar for whatever
3 you think ought to come next. All right.

4 MR. JOHNSON: Thank you, Your Honor.

5 THE COURT: Okay. Thank you.

6 (Whereupon these proceedings were concluded at 12:05
7 PM)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

RULINGS

PAGE

Doc. #11147 Motion to Authorize/Trustee's Motion for an Order to (I) Establish a Second Interim Distribution Fund for Unsecured General Creditor Claims, (II) Release Reserves from the Secured and Priority Reserve and the First Interim Distribution Fund, and (III) Make a Second Interim Distribution to Holders of Allowed Unsecured General Creditor Claims with a Record Date of February 6, 2015	11
Doc. #11046 Motion to Authorize/Trustee's Motion for an Order Authorizing the Abandonment of Certain Lehman Brothers Inc. Data	12
Doc. #6758 One Hundred Second Omnibus Objection to General Creditor Claims (Satisfied Claims)	25
Doc. #9605 Two Hundred Sixtieth Omnibus Objection to General Creditor Claims (No Liability Claims)	--

I N D E X

RULINGS

PAGE

Doc. #47931 Motion to Approve Compromise: Motion

Pursuant to Rule 9019 of the Federal Rules of

Bankruptcy Procedure and Section 105(a) of the

Bankruptcy Code for Approval of Settlement

Agreement Relating to Exum Ridge CBO 2007-2

Credit Default Swap Agreement and Indenture

68

Doc. #47078 Four Hundred Eighty-Sixth Omnibus

Objection to Claims (Satisfied Claims)

80

Doc. #47589 Motion to Allow/Deem Proofs of Claim

to Be Timely Filed by the Claims Bar Date

--

C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the
foregoing transcript is a true and accurate record of the
proceedings.

Sherri
Breach

Digitally signed by Sherri Breach
DN: cn=Sherri Breach, o=Veritext,
ou, email=digital@veritext.com,
c=US
Date: 2015.02.20 16:10:58 -05'00'

SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber CERT*D-397

Date: February 20, 2015

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501